84-6873

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

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ROBERT PATTEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Supreme Court, U.S.
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QUESTIONS PRESENTED

I. WHETHER THE FLORIDA SUPREME COURT'S RETROACTIVE REVERSAL OF ITS LONG ESTABLISHED RULE THAT THE STATE BEARS THE BURDEN OF ESTABLISHING THE COMPETENCY OF A PERSON PREVIOUSLY ADJUDICATED INCOMPETENT, AND WHOSE COMPETENCY HAS NEVER BEEN RESTORED, SO DISADVANTAGES A DEFENDANT AS TO VIOLATE THE DUE PROCESS CLAUSE IF HIS CONVICTION IS UPHELD ABSENT ANY PROOF BY THE STATE OF COMPETENCY?

II. WHETHER THE DOUBLE JEOPARDY CLAUSE IS VIOLATED WHEN THE FLORIDA SUPREME COURT ORDERS A DEFENDANT TO UNDERGO A SECOND CAPITAL SENTENCING PROCEEDING AFTER DETERMINING THAT THE TRIAL COURT ERRONEOUSLY REFUSED TO ACCEPT A JURY LIFE RECOMMENDATION?

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Petitioner seeks a writ of certiorari to review a judgment of the Supreme Court of Florida entered in this case on April 18, 1985.

CITATIONS TO OPINION BELOW

The opinion of the Florida Supreme Court, Case No. 61,945, has not yet been officially reported. It is set out as Exhibit A of the Appendix.

JURISDICTION

The original opinion of the Florida Supreme Court was entered on January 10, 1985, and is set out as Exhibit B of the Appendix. A timely Motion for Rehearing, set out as Exhibit C of the Appendix, was denied by an Order of the Supreme Court of Florida dated April 18, 1985, set out as Exhibit D of the Appendix. A revised opinion issued that date because

petitioner's Motion to Supplement the Record, which was joined with the Motion for Rehearing, was granted.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States. The Florida Supreme Court's rejection of petitioner's double jeopardy claim is final for purposes of appeal. Bullington v. Missouri, 451 U.S. 430, 437 n. 8 (1981).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case invloves the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF FACTS

Robert Patten was convicted of murder, armed robbery, grand theft, and a probation violation. The trial court sentenced him to death on the murder charge. He was sentenced to 110 years for the robbery, five years for the grand theft and five years for the probation violation, all sentences to run consecutively. On appeal, the Florida Supreme Court affirmed the convictions. It vacated the death sentence and remanded the case to the trial court for a second sentencing proceeding before a second jury.

A. The Continuing Presumption of Insanity.

Several years prior to commission of the offenses here at issue, Robert Patten had been acquitted of other criminal charges on the grounds of insanity. His competency has never been judicially restored. Both the State and the trial court were aware of the prior insanity acquittal. Florida case law, since at least 1892, holds that a previous insanity acquital, without judicial restoration of competency, results in a presumption of continuing insanity.[1] As a result, Florida case law, at the time

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1. The status of Florida law is discussed infra, beginning at page 5.

of Robert Patten's trial and prior to the Florida Supreme Court's decision on his appeal, held that the burden of proof as to the competency of the defendant at the time of subsequent offenses rested on the State. Nevertheless, at trial, neither the State nor the defense produced any evidence relating to Robert Patten's competency at the time he committed the murder and other crimes for which he stands convicted.

Petitioner first raised the issue of the State's failure to establish his competency by way of a timely motion for a new trial (R-535)[2] and then on direct appeal to the Florida Supreme Court. The Florida Supreme Court, holding that insanity is always an affirmative defense, rejected petitioner's argument that the State bore the burden of proving his competency as an essential element of its case.

On timely Motion for Rehearing, petitioner argued that the Court's decison represented a reversal of long established Florida law. He argued that if the change were applied retroactively to his trial, thereby permitting the State to obtain a conviction without proof of competency, it would violate the ex post facto component of the Due Process Clause. The Florida Supreme Court, refusing to even acknowledge that its decision abolished a long-established rule allocating the burden of proof, adhered to its prior opinion without discussion of the issue.

B. The Trial Court's Refusal to Permit the Jury to Return A Life Recommendation.

The Florida capital punishment sentencing scheme calls for the jury to recommend life or death, with the judge making the actual sentencing decision.[3] As interpreted by the Florida Supreme Court, a death recommendation requires a majority vote.

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2. The symbol "R" refers to the separately numbered part of the record on appeal which includes all trial court matters except the transcript (which will be referred to by the symbol "T") and the trial court exhibits.

3. Spaziano v. Florida, 468 U.S. ___ (1984).

A six to six vote is a recommendation for life.[4] At the time of petitioner's trial, the effect of a six to six vote had not been addressed by the Florida Supreme Court. The trial court gave the Florida standard jury instruction with respect to determining the recommended penalty. The instruction is ambiguous. Initially, the instruction states that the jury can recommend life "if by six or more votes" the jurors agree. Subsequently, the instruction asks the jury to report its recommendation "when seven or more are in agreement." The relevant portion of the instruction is contained in Exhibit E of the Appendix.

After deliberating for more than two and one half hours, the jury sent a note to the court stating it had reached a six to six vote and asking: "What now?" (T-1773). Defense counsel argued that a six to six vote was a life recommendation. The State agreed. (T-1774, 1775, 1778). Over defense objection (T-1778), the trial court, on its own motion, proceeded to give its version of a jury deadlock charge (T-1779-80). The Jury Foreman then inquired whether a majority vote was required for a life recommendation (T-1780). The trial court responded that it did not know, that the jury should continue deliberating, and that if a majority could not be reached the court would accept the tie vote as a life recommendation (T-1781-82). Thirty minutes later (T-1783), the jury returned with a seven to five death recommendation (T-1785). The relevant portions of the transcript are set out as Exhibit F of the Appendix.

While petitioner's appeal was pending, the Florida Supreme Court decided that a six to six vote was a life recommendation. Following its holding in Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983), it vacated Robert Patten's death sentence. However, it rejected petitioner's arguments that he was entitled to the benefit of the jury's attempted life recommendation, that the trial court lacked the

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4. Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983).

authority to reject a recommendation permitted by the jury instructions, and that to subject petitioner to a second capital sentencing proceeding before a new jury would violate the Double Jeopardy Clause. Instead, the Supreme Court of Florida ordered a second capital sentencing proceeding before a second jury.

REASONS FOR GRANTING THE WRIT

I

WHETHER THE FLORIDA SUPREME COURT'S RETROACTIVE REVERSAL OF ITS LONG ESTABLISHED RULE THAT THE STATE BEARS THE BURDEN OF ESTABLISHING THE COMPETENCY OF A PERSON PREVIOUSLY ADJUDICATED INCOMPETENT, AND WHOSE COMPETENCY HAS NEVER BEEN RESTORED, SO DISADVANTAGES A DEFENDANT AS TO VIOLATE THE DUE PROCESS CLAUSE IF HIS CONVICTION IS UPHELD ABSENT ANY PROOF BY THE STATE OF COMPETENCY?

Florida case law, for nearly a century, has held that the usual presumption of sanity does not exist once a person has been found insane. Instead, there is a presumption of continuing insanity, a presumption which can only be removed by proof of sanity. Wells v. State, 98 So.2d 795 (Fla. 1957). See, Bratten, Florida Criminal Procedure §7.4, pp. 89-90 (1983). The consequences of a continuing presumption of insanity were clear: The State, not the defendant, bore the initial burden of going forward, as well as the ultimate burden of proof. Accordingly, until the opinion at bar, Florida decisions uniformly reversed the convictions of individuals with prior insanity acquittals if the State failed to prove at trial that the individual was competent at the time he committed a subsequent offense.

For the first time, on direct appeal of petitioner's convictions, the Florida Supreme Court held that insanity is always an affirmative defense.[5] After-the-fact, the State was

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5. The only authority offered by the Florida Supreme Court for that position was a citation to A.B.A. Criminal Justice Mental Health Standard 7-6.9, A.B.A. Standards for Criminal Justice (2d ed. 1984). Similarly, the State offered no citation of authority in its brief for the proposition that insanity was an affirmative (fn. cont. next page)

relieved of both the obligation of producing evidence and the obligation of proving competency as a essential element of its case in chief. As a result of the abrupt change in law, petitioner's convictions were affirmed.[6] This retroactive judicial lawmaking violates the ex post facto component of the Due Process Clause.

The rule placing both the burden of going forward and the burden of proof on the State dated from at least 1892. Armstrong v. State, 30 Fla. 170, 11 So. 618 (1892). It had been consistently followed. Corbin v. State, 129 Fla. 421, 176 So. 435 (1937); Acree v. State, 15 So.2d 262 (Fla. 1943); Emerson v. State, 294 So.2d 721 (Fla. 4th DCA 1974); Alexander v. State, 360 So.2d 1188 (Fla. 5th DCA 1980); Livingston v. State, 383 So.2d 947 (Fla. 2d DCA 1980); King v. State, 387 So.2d 463 (Fla. 1st DCA 1980); Eason v. State, 421 So.2d 35 (Fla. 3d DCA 1982).

The State, ignoring this unbroken line of authority, made no effort to prove at trial that Robert Patten was competent at the time of the alleged offenses. On appeal, the Supreme Court of Florida, by holding that insanity is always an affirmative defense, eliminated what previously had been considered an essential element of the State's burden of proof. In so doing, the Supreme Court of Florida reversed, without benefit of citation, six of its prior decisions. Perkins v. Mayo, 92 So.2d 641 (Fla. 1957); Wells v. State, 98 So.2d 795 (Fla. 1957); Horace v. Culver, 111 So.2d 670 (Fla. 1959); Dixon v. Cochran, 142 So.2d 5 (Fla. 1962), cert. denied, 371 U.S. 866 (1962); Clark v. Wainwright, 148 So.2d 273 (Fla. 1963); Yates v. Wainwright, 151 So.2d 832 (Fla. 1963).

In Horace v. Culver, supra, the Florida Supreme Court held:

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defense in the situation where a defendant was entitled to a presumption of continuing insanity. The portion of the State's brief on direct appeal dealing with the competency issue is included as Exhibit G of the Appendix.

6. Petitioner does not challenge the power of the Florida Supreme Court to adopt a rule providing that insanity is always an affirmative defense, so long as the rule is prospective.

> The decided cases adequately dispose of the contention that any burden might rest upon the disabled party in such circumstances to inform the court or formally plead his status. An accused cannot, under our law be tried, sentenced or executed while insane, and the ignorance or good faith of the court and prosecuting officers does not serve to validate a proceeding conducted in violation of this precept.

111 So.2d at 671 (footnotes omitted).

The same rule applied if the defendant was convicted after trial. Wells v. State, 98 So.2d 795 (Fla. 1957). Wells was a death case where the State argued that its failure to rebut the presumption of continuing insanity was not properly preserved. The Florida Supreme Court, recognizing the "absolute finality in an executed sentence of death," 98 So.2d at 801, held that even if the defendant had failed to properly preserve the issue, "in appeals where the death penalty has been imposed, we feel it our duty to overlook technical niceties in the interests of justice." Id. The defendant's conviction was reversed. Apparently the philosophy has changed. Now, it is the State's failures that are overlooked.

Nothing in Florida statutory law, Florida case law, or the Florida Rules of Criminal Procedure, prior to Robert Patten's appeal, ever declared incompetency to be affirmative defense where the defendant had previously been adjudicated incompetent and his competency not judicially restored. Because of that, the Florida Supreme Court was unable to cite even one case for the proposition of law it retroactively applied to petitioner.

Certiorari should be granted to resolve the issue of when a change, seemingly procedural in nature, so disadvantages a defendant that it cannot, as a matter of due process, be applied retroactively to sustain a conviction not otherwise sustainable. The issue is clearly presented in the matter sub judice. Prior Florida case law reversed convictions if the State failed to establish competency. By relieving the State of its burden, after the trial, Robert Patten's convictions were affirmed. Petitioner suggests that any procedural rule having the effect of

eliminating an element of the State's proof, or shifting the burden of producing evidence, cannot be applied retroactively.

"The Ex Post Facto Clause is a limitation upon the power of the Legislature, . . . and does not of its own force apply to the Judicial Branch of government. . . . But the principle on which the Clause is based -- the notion that persons have a right to fair warning of conduct which will give rise to criminal penalties -- is fundamental to our concept of constitutional liberty. . . . As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment." Marks v. United States, 430 U.S. 188, 192-193 (1977)(citations omitted). "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." Bouie v. City of Columbia, 378 U.S. 347, 353-354 (1964).

Lafave & Scott, Handbook on Criminal Law at 94-95 (1972), note that "[p]erhaps the easiest case is that in which a judicial decision subsequent to the defendant's conduct operates to his detriment by overruling a prior decision which, if applied to the defendant's case, would result in his acquittal." The Florida Supreme Court's opinion does exactly what Professors Lafave and Scott suggest amount to the easiest case. It overrules prior precedent under which petitioner's convictions would have been reversed.

Changes in the rules of evidence that work to the detriment of the defendant are barred by the Ex Post Facto Clause. The Clause extends to any alteration, even one labeled procedural, which, "in relation to the offense, or its consequences, alters the situation of a party to his disadvantage . . ." Kring v. Missouri, 107 U.S. 221, 236 (1882). In Hopt v. Utah, 110 U.S. 574 (1884) this Court stated:

> Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed,

> might, in respect of that offfense, be obnoxious to the constitutional inhibition upon ex post facto laws. But alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but -- leaving untouched the nature of the crime and the amount or degree of proof essential to conviction -- only removes existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure.

110 U.S. at 591. The principle to be deduced from Hopt and other cases is that a change can only be considered procedural when it does not alter "[t]he quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence, remain the same." Beazell v. State of Ohio, 269 U.S. 167, 170 (1925).

Numerous cases have recognized that a significant alteration in the rules of evidence cannot be applied retroactively to sustain a conviction. United States v. Williams, 475 F.2d 355 (D.C. Cir. 1973), considered statutory amendments altering the quantum of proof necessary to establish insanity and shifting the burden of proof to the defendant. In reaching a conclusion directly opposite to that of the Florida Supreme Court, the Williams Court held that the statutory modifications violated the Ex Post Facto Clause if applied to defendants whose crimes were committed prior to the statutory amendments. The Court stated:

> A long time ago the United States Supreme Court defined ex post facto laws to include "[e]very law which alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798). (Emphasis in original.) That definition represents the law today just as it did in 1798. The retroactive application given Section 207(6) by the trial court "alter[ed] the legal rules of evidence" so that appellant was convicted on "less, or different, testimony, than the law required at the time of the commission of the offence." Certainly the court's charge, "'in its relation to the offence, or its consequences, alter[ed] the situation of the accused to his disadvantage.'" Thompson v. Utah, 170 U.S. 343, 351, 18 S.Ct. 620, 623,

> 42 L.Ed. 1061 (1898), quoting United States v. Hall, 2 Wash.C.C. 366. Moreover, Congress, in enacting Section 207(6), specifically intended to alter the situation of the accused to his disadvantage. Congress was concerned that existing law "* * * permitt[ed] dangerous criminals, particularly psychopaths, to win acquittals of serious criminal charges on grounds of insanity by raising a mere reasonable doubt as to their sanity * * *."
>
> Under the circumstances, appellant's conviction must be reversed on ex post facto grounds.

475 F.2d at 356-57 (footnotes omitted)(emphasis in original).

The adoption of the Comprehensive Crime Control Act of 1984, Pub. L. 98-437, 98 Stat. 1837 (1984), has afforded the District Courts the opportunity to apply the Williams holding in a similar factual context. The Act alters the definition of insanity and shifts the burden of proof to the defendant. Those courts which have considered the issue have, on ex post facto grounds, refused to apply the changes to those defendants who crimes were alleged to have occurred prior to the effective date of the Act. United States v. Prickett, 604 F. Supp. 407 (S.D. Ohio 1985); United States v. Turner, 602 F. Supp. 1295 (S.D. N.Y. 1985); United States v. Kowal, 596 F. Supp. 375 (D. Conn. 1984).

The Florida Supreme Court also shifted the burden of proof. However, it applied the shift, contrary to the weight of authority, retroactively.

Contrary to the Florida Supreme Court, other courts have also recognized that significant alterations in the rules of evidence cannot be applied retroactively. In Walker v. State, 433 So.2d 469 (Ala. 1983), the Alabama Supreme Court held that repeal of the law making inadmissible statements made by a child while in police custody worked such a substantial disadvantage to the juvenile as to invoke the Ex Post Facto Clause. The Court went on to hold that "[b]ut for the legislature's repeal [of the evidentiary bar], the defendant admittedly would have been acquitted. Certainly such a change deprives the defendant of a right in a most substantial way." 433 So.2d at 473.

Similarly, in State v. R. H., 273 S.E.2d 578 (W.Va. 1980), the prior law provided that no testimony of a juvenile offender given at a transfer hearing could be admitted into evidence at any subsequent criminal trial. The trial judge announced that he would apply the new juvenile code, which did not contain the admissibility bar. Therefore, the juvenile chose not to testify in order to protect his fifth amendment rights, resulting in his transfer for trial as an adult. The conviction was reversed, the West Virginia Supreme Court finding that application of the new rule violated the Ex Post Facto Clause.

In State v. Byers, 102 Idaho 159, 627 P.2d 788 (1981), the Idaho Supreme Court abolished the requirement of corroboration for sex offender crimes. However, because no corroborative testimony was offered at Byers' trial, his conviction was reversed. "Obviously," noted the Court, "our holding today alters the legal rules of evidence such that 'less or different testimony than the law required at the time of the commission of the offense [is necessary] in order to convict the offender.'" 627 P.2d at 795.

The Kentucky Supreme Court originally reached the same conclusion in Commonwealth v. Brown, 619 S.W.2d 699 (Ky. 1981). It reversed itself in Murphy v. Commonwealth, 655 S.W.2d 69 (Ky. 1983), cert. denied, ___ U.S. ___ (1984), prompting Justices White, Brennan and Powell to dissent from the denial of the writ. Writing for the dissenters, Justice White suggested that the issue of when a seemingly procedural change offends the Ex Post Facto Clause is ripe for review.

Because the position reached by the Florida Supreme Court, like the position reached by the Kentucky Supreme Court, is inconsistent with a substantial body of federal and state decisional law, petitioner suggests that this Court address the issue of whether eliminating an essential element of the State's case or shifting the burden of proof can ever be applied retroactively.

II

WHETHER THE DOUBLE JEOPARDY CLAUSE IS VIOLATED WHEN THE FLORIDA SUPREME COURT ORDERS A DEFENDANT TO UNDERGO A SECOND CAPITAL SENTENCING PROCEEDING AFTER DETERMINING THAT THE TRIAL COURT ERRONEOUSLY REFUSED TO ACCEPT A JURY LIFE RECOMMENDATION?

Despite its holding that a six to six jury vote at the penalty phrase of a death case constitutes a recommendation for life, the Florida Supreme Court denied petitioner the benefit of the jury's six to six life recommendation and ordered the empaneling of a new jury for purposes of obtaining a second recommendation.[7] As a result, petitioner has lost the benefit of the life vote and is again forced to run the gauntlet of a new trial limited to the issue of penalty.

The basic premise of petitioner, that the State is not entitled to two chances to pursuade a jury that death is the proper sentence, is fully supported by Bullington v. Missouri, 451 U.S. 430 (1981). In Bullington this Court noted the trial like nature of the sentencing procedure and stated:

> By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, however, Missouri explicitly requires the jury to determine whether the prosecution has "proved its case."

451 U.S. at 445 (emphasis in original). Justice Blackmun then quoted with approval the observation of the dissenting Judge of the Missouri Supreme Court "that the sentence of life imprisonment which petitioner received at his first trial meant that 'the jury has already acquitted the defendant of whatever was necessary to impose the death sentence.'" 451 U.S. at 446.

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7. In Florida, the jury's recommendation, while not binding on the sentencer (the trial judge), is of critical importance. When the jury recommends death, and the sentencer finds one or more aggrevating factors, death is presumed to be the correct sentence. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). On the other hand, when the trial judge overrides a jury's life recommendation, the override will only be sustained if reasonable men cannot differ that death is the appropriate sentence. Tedder v. State, 322 So.2d 908 (Fla. 1975).

Florida, too, provides a trial like proceeding for determining life or death. In Florida, like Missouri, the burden is on the State to establish that death is the appropriate sentence. The Florida jury is instructed that it can only recommend death if it finds, beyond a reasonable doubt, the existence of one or more aggravating factors and does not find those factors to be outweighed by mitigating factors. Proffitt v. Florida, 428 U.S. 242 (1976). The jury's recommendation, although not binding, is entitled to great weight. A trial judge's authority to override a life recommendation is limited. Tedder v. State, 322 So.2d 908 (Fla. 1975). In all respects, except for the trial judge's ultimate sentencing power, the trial-like Florida procedure is identical to the trial-like Missouri procedure.

The fact finding process, upon which Bullington focuses, was completed when the jury announced its six to six vote. The jury had already acquitted the defendant of whatever was necessary to recommend a death sentence. The values which underlie the Double Jeopardy Clause are "equally applicable when a jury has rejected the State's claim that the defendant deserves to die." 451 U.S. at 446.

Petitioner's original jury was prepared to return a life recommendation. The only reason it did not was the uncalled for jury deadlock instruction given by the trial judge. Once the jury has rejected the State's claim that the defendant deserves to die, Bullington and Arizona v. Rumsey, ___ U.S. ___ (1984), construe the Double Jeopardy Clause to mean that the State is not entitled to another opportunity to convince either the same jury or another jury to make a contrary recommendation. The decision of the Florida Supreme Court is in direct conflict with the double jeopardy principles announced in those cases.

The Florida Supreme Court's decision is also in direct conflict with the decision of the Delaware Supreme Court in Rush v. Delaware, ___ A.2d ___ (Del. March 19, 1985). In Rush, the

Court held that a defendant must be sentenced to life where the trial judge erroneously prevents the jury from returning a life recommendation and, after a jury deadlock instruction, the jury returns with a death recommendation. In reaching its conclusion, the Delaware Supreme Court cited and rejected the Rose decision. Because the two courts have reached diametrically opposite conclusions in identical factual situations, this Court should examine the double jeopardy implications that attach.

The writ should be granted to resolve the question whether a defendant can be exposed to a second capital sentencing proceeding where the first advisory jury's recommendation is rejected because of the error of the trial court.

Robert Patten's entitlement to a life recommendation flows from the fact that a trial judge has no authority to reject a jury's favorable treatment of the defendant. When the trial judge exceeded his authority and improperly rejected the jury's decision making process, the defendant became entitled to the benefit of the jury's attempted verdict. That has been true since at least 1670. Bushell's Case (1670) Vaughan's Rep. 135. It represents one of the great triumphs of the common law, the victory of the jury over the king. As a result, the judge is not authorized to prevent the return of a verdict in a criminal case. See, I Holdsworth, A History of English Law 337-347 (7th ed., reprinted 1971); Thayer, The Jury and its Development, Part III, 5 Harv. L. Rev. 357, 382-385 (1892).

It is accepted as basic constitutional and common law that the court must accept the decision of the jury. State v. Arrington, 7 N.C. 355, 3 Mur. 571 (1819); State v. Ostrander, 30 Mo. 13 (1860). These early decisions established that the trial court must record the verdict first brought in so long as it is not an informal or insensible verdict, or one that is not responsive to the issues submitted.

Robert Patten's jury was ready to return a responsive verdict. The Court prevented it. Robert Patten is entitled to

the benefit of that attempted verdict. There is no authority that permits a "court to refuse to accept a verdict complete in substance and responsive to the issues." State v. Chambliss, 142 Miss. 256, ___, 107 So. 200, 202 (1926). The State may argue that there was no verdict. That is true in the sense that none of the formalities attendant to the return and entry of a verdict took place. But the fault lies with the trial judge, not the jury, and certainly not the defendant. In none of the cases which stand for the hornbook proposition that a court cannot reject a verdict were the formalities complied with. They could not be because the trial court refused to accept the verdict. That type of error cannot be permitted. The petitioner is entitled to the jury's life recommendation.

A typical example of refusal to permit the trial judge to reject the jury's decision is State v. Craig, 176 N.C. 740, 97 S.E. 400 (1918). There the jury returned with a verdict of "not guilty". The judge sent the jury back to consider whether the verdict was "not guilty because of mental incapacity." The North Carolina Supreme Court held the trial court has no authority to send the jury back; the first verdict was binding.

A case analogous to petitioner's is Darsey v. State, 138 Ga. 501, 71 S.E. 661 (1911), app. dis'd, 231 U.S. 741 (1913), where the jury returned with a guilty verdict for a non-charged lesser offense. The judge refused to accept the verdict and sent the jury back. The jury deadlocked and the judge declared a mistrial. The Georgia Supreme Court held that double jeopardy prevented a retrial because the original verdict constituted an acquittal of the greater offenses and the trial court lacked the authority to refuse to accept it. See also, State ex rel. Earsom v. Fisher, 103 W.Va. 658, 138 S.E. 316 (1927). Indeed, the defendant is entitled to the benefit of the jury's decision even if the jury returns a verdict that is contrary to the Court's charge. Register v. State, 10 Ga.App. 802, 74 S.E. 428 (1912).

The error committed by the trial judge is no different, for

analytical purposes, from the error committed by a trial judge who grants a mistrial on his own or the State's motion in the absence of manifest necessity. In both situations, the formalities attendant to the return of a verdict are cut off by the trial judge's error. In the mistrial situation, application of double jeopardy principles, bars a second trial because of the judge's error. Oregon v. Kennedy, 456 U.S. 667 (1982). Thus, the defendant benefits from a totally unknown jury verdict. In Robert Patten's situation, the intent of the jury was obvious. The trial judge's error should not serve to deprive him of the benefit of the jury's life recommendation.

The petitioner will not go free because the trial court erred. The petitioner should, however, receive the benefit of the jury's untainted deliberations. There is no sound reason to deprive a capital defendant of the benefit of the jury's favorable recommendation. That does not seem unfair in light of the nature of the case and the nature of the error.

The writ should be granted to consider whether the Double Jeopardy Clause prevents a court from setting aside a jury recommendation for life, thereby permitting the State another oppportunity to obtain a death recommendation.

CONCLUSION

For the foregoing reasons, the writ requested should be granted.

Respectfully submitted,

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Counsel for Petitioner

* Counsel to be served,
Member of the Bar of the Court.

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

==========

ROBERT PATTEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

==========

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court and that I served the annexed Petition for Certiorari on respondent by placing a copy in the United States mail, first class mail, postage prepaid, addressed as follows:

Calianne Lantz, Esquire
Assistant Attorney General
Office of the Attorney General
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128.

All parties required to be served have been served. Done this 6th day of June, 1985.

Peter M. Siegel, Esq.

84-6873

(3)

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SUPREME COURT, U.S.

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

==========

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Member of the Bar of the Court.

10pp

EXHIBIT A

Supreme Court of Florida

REVISED

No. 61,945

ROBERT PATTEN, Appellant/Cross-Appellee,

vs.

STATE OF FLORIDA, Appellee/Cross-Appellant.

[January 10, 1985]

REVISED

OVERTON, J.

This is a direct appeal from Robert Patten's conviction of first-degree murder and the imposition of the death sentence. Appellant was also convicted of armed robbery and grand theft, and was found to have violated his probation for the offense of auto theft. He was sentenced to 110 years for the robbery conviction, five years for grand theft, and five years for auto theft, all sentences to be served consecutively. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and we affirm all of appellant's convictions and sentences with the exception of the death sentence. We find that we must vacate the death sentence and remand for a new sentencing proceeding before a jury because the trial judge erroneously instructed the jury that it should try to reach a majority verdict after the jury had advised the court it was deadlocked concerning its sentencing recommendation for the first-degree murder conviction.

The facts reflect that on September 2, 1981, the victim, a Miami police officer, attempted to stop appellant for traveling the wrong way on a one-way street. Appellant abandoned his car, which was later determined to have been stolen, and fled the

scene on foot. He ran down an alley with the officer in pursuit. Witnesses heard gunshots and one witness testified that appellant had hidden in the alley and waited for the officer to approach before shooting him. The officer was found dead with two bullet wounds. One bullet had penetrated his heart, killing him instantly, and another had entered the officer's foot in a manner indicating that the officer had been shot after he was dead and lying prostrate.

Immediately after the shooting, appellant stole a car at gunpoint and fled the area. He was arrested later that day and charged with first-degree murder, armed robbery, grand theft, and violation of probation. Two days later, after obtaining a search warrant, the police recovered the murder weapon from beneath a heating grate in appellant's grandmother's home.

Prior to trial, the court and the prosecutor were apprised of the facts that appellant had been adjudicated not guilty of receiving stolen property by reason of insanity in 1978 and had been involuntarily committed to the Department of Health and Rehabilitative Services for treatment under the provisions of section 394.467, Florida Statutes (1977). On September 25, 1981, the trial court, on its own motion prior to appellant's arraignment, ordered an evaluation of the appellant "covering all issues including insanity and competency and incompetency to stand trial." Prior to receiving the reports of the four experts appointed to examine appellant, and prior to the hearing on appellant's competency to stand trial, counsel for the appellant withdrew a pending motion for release on bail and orally advised the trial court that the defense would be filing a notice of intent to rely on the insanity defense and would request a hearing to determine if appellant was mentally competent to stand trial. Counsel for appellant subsequently filed a notice of intent to rely on the insanity defense and a motion requesting a competency hearing.

The court-ordered competency hearing was held on October 9, 1981. Three of the appointed doctors testified before the

court and the fourth doctor's written report was submitted to the court by stipulation. During the course of these proceedings, the 1978 trial court order finding appellant not guilty by reason of insanity and the orders conditionally releasing him were admitted into evidence. The trial court found, in accordance with the unanimous opinion of the experts, that the appellant was competent to stand trial pursuant to the criteria set forth in Florida Rule of Criminal Procedure 3.211. The trial court proceeded to arraign the appellant and, when he stood mute, entered a plea of not guilty on his behalf.

In a pre-trial motion, counsel for the appellant moved for a ruling on the insanity test to be applied at trial. Appellant asserted that the trial court should discard the M'Naghten rule and adopt the A.L.I. Model Penal Code test. While acknowledging that the appellant had been examined by a number of psychiatrists, all of whom indicated that the accused was legally sane under the M'Naghten rule, defense counsel argued that the M'Naghten rule constituted both a denial of substantive and procedural due process and cruel and unusual punishment. The trial court denied the motion, finding that it had no authority to change the criteria for the test for insanity that had been specifically adopted by the Supreme Court of Florida.

Counsel for the appellant also filed a pre-trial motion to have the electronic media excluded from the courtroom during the trial on the ground that their presence would affect the ability of the appellant to consult with his counsel. The trial court denied the motion after conducting a hearing attended by the state, the defense, and the media.

In the trial phase of the proceedings, the defense did not contest that appellant had killed the police officer; the theory of the defense was that appellant, in firing the shots, had acted "in a moment of panic" and that this tragic offense was not premeditated murder. Further, no evidence was submitted regarding appellant's prior adjudication of not guilty by reason

of insanity. The jury found the appellant guilty of all offenses charged.

During the sentencing phase of the trial, the state initially presented evidence in aggravation that appellant had been convicted of robbery in 1975. The defense then presented the testimony of two psychologists to establish the statutory mitigating circumstances that the murder was committed while appellant was "under the influence of extreme mental or emotional disturbance," section 921.141(6)(b), Florida Statutes (1981), and that the "capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired," section 921.141(6)(f). Both psychologists testified that these factors clearly applied to appellant. In addition to these conclusions, one psychologist described at length appellant's background and upbringing, including the fact that his mother had substantial mental problems, which resulted in her commitment; that he was an unwanted child; that he had suffered severe physical abuse, including being spit upon and thrown against the wall; that his father died when he was two years old; that, when appellant was six years old, it was discovered that he suffered from a degenerative bone disease which required him to spend a year in a body cast, during which time he continued to suffer physical abuse at the hands of his mother; that his leg was broken two days after the removal of his body cast and he was forced back into the body cast for more than eight months; that after returning to school his conduct required expulsion; that at age ten he was diagnosed as emotionally disturbed and another diagnosis recommended hospitalization; that his mother used choking as a disciplinary device; and that he began using drugs at an early age and suffered a barbiturate overdose at the age of fourteen. The history of the 1976 stolen property offense, his commitment as a result of being incompetent to stand trial, his acquittal on the charges by reason of insanity, and the resulting treatment were also presented to the jury. In rebuttal, the

state presented the testimony of two psychiatrists who had examined appellant for competency to stand trial and insanity at the time of the offense. Both psychiatrists testified that appellant was able to conform his conduct to the requirements of law and both reflected an opinion that he was trying to fake mental illness.

During sentencing deliberations, the jury advised the trial judge that they were deadlocked six-to-six with regard to a recommended sentance. The judge instructed the jury:

> If you can agree on a majority to either life or death, without trying to pressure you, by talking it over one more time and agreeing one way or another, and I'm not suggesting any result, but if after trying one more time you can't agree and it's still six/six, I will instruct you to go ahead and sign that verdict form that includes life imprisonment without parole for 25 years.

The jury, after continued deliberations, returned with a seven-to-five recommendation for death.

The trial judge imposed the death sentence and found that the following statutory aggravating factors applied: (1) appellant had previously been convicted of a felony involving the use or threat of violence; (2) the murder was committed to avoid a lawful arrest; and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. In finding that there were no mitigating circumstances, the trial court expressly rejected the evidence presented by the appellant to prove that he had suffered from an extreme emotional or mental disturbance at the time of the homicide and that appellant's capacity to appreciate the criminality of his conduct was substantially impaired. The trial court recognized that the testimony of the experts for the state and for the defendant was "in direct contradiction" and expressly found that it should accept the testimony of the state's witnesses. The trial judge concluded that there were no statutory or nonstatutory mitigating factors applicable to this case.

Guilt Phase

In his first point, appellant argues that his prior adjudication of not guilty by reason of insanity and his subsequent civil commitment require the state to present evidence to establish his sanity as an element of the offense even though appellant failed to offer any evidence of the insanity defense at trial. Counsel for appellant advised the court orally, after the court had appointed doctors to examine appellant but before the examinations were complete, that she planned to file a notice of intent to rely on the defense of insanity. Counsel subsequently filed a notice of intent to rely on the insanity defense. After all four court-appointed experts found appellant competent to stand trial and competent at the time of the offense under the state's modified M'Naghten test, counsel did not attempt to affirmatively assert the defense of insanity under that test. In our view, this was not an inadvertent omission by counsel. Facing the obvious improbability of a successful insanity defense under these circumstances, counsel instead sought to have the trial judge reject the modified M'Naghten test and adopt the broader criteria contained in the American Law Institute's Model Penal Code, including the "irresistible impulse" test. This Court has expressly rejected that portion of the A.L.I. insanity test that the appellant requested the trial court to accept. See Mines v. State, 390 So. 2d 332 (Fla. 1980); In re Standard Jury Instructions in Criminal Cases, 327 So. 2d 6 (Fla. 1976). The criteria adopted by this Court for insanity at the time of the offense are as follows:

> The law does not hold a person criminally accountable for his conduct while insane, since an insane person is not capable of forming the intent essential to the commission of a crime. A person is sane and responsible for his crime if he has sufficient mental capacity when the crime is com ted to understand what he is doing and to understand that his act is wrong. If at the time of an alleged crime a defendant was by reason of mental

> infirmity, disease or defect unable to understand the nature and quality of his act or its consequences or, if he did understand it, was incapable of distinguishing that which is right from that which is wrong, he was legally insane and should be found not guilty by reason of insanity.
>
> Insanity may be permanent, temporary, or may come and go. . . .
>
> . . . .
>
> Unrestrained passion or ungovernable temper is not insanity, even though the normal judgment of the person may be overcome by passion or temper.

Fla. Std. Jury Instr. Crim. Cases, 2.11(b)-1 (S. Ct. Comm. 1976). See also Fla. Std. Jury Instr. Crim. Cases 1.04(b)(S. Ct. Comm. 1982).

We stated in Wheeler v. State, 344 So. 2d 244, 246 (Fla. 1977), that this "jury instruction on insanity correctly states the law of Florida," and we directed that "it shall be utilized in all trials" after the date that opinion became final. In Wheeler, we explained that we had declined "to adopt the so-called 'irresistible impulse' portion of the A.L.I. test which excuses from criminal responsibility the defendant who 'lacks substantial capacity . . . to conform his conduct to the requirement of the law,'" although we did adopt the "'disease or defects element' of the A.L.I. test."[1] Id. The trial court properly denied appellant's motion.

The position of the appellant, that the state in this cause had the initial burden of proving sanity, is neither logical nor reasonable. If we adopted appellant's position, the state would have been obligated to present the four expert witnesses who would have testified that appellant was sane at the time of the offense and, in so doing, they would have necessarily related the history of his prior criminal convictions and his commitment for psychiatric problems. The production of this evidence by the state in its case in chief would be mandated under appellant's argument, even though the appellant had not

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1. The Florida standard for determining a defendant's competency to stand trial is essentially identical to the newly adopted A.B.A. Criminal Justice Mental Health Standard 7-6.1, A.B.A. Standards for Criminal Justice (2d ed. 1984).

placed his sanity in issue at the trial and the state's evidence of sanity would be prejudicial to the appellant. It is important to recognize that insanity is an affirmative defense in this state and a defendant has the burden of coming forward and presenting some evidence of insanity at trial. Under this process, once a defendant presents evidence of insanity, the prosecution has the burden of disproving defendant's claim beyond a reasonable doubt.[2] The argument that the appellant's prior adjudication of not guilty by reason of insanity and his involuntary civil commitment require the state to prove competency is correct only when the defense of insanity is asserted and evidence of the adjudication and commitment is introduced at trial. In this case the defense of insanity was not asserted, nor was the evidence of appellant's prior adjudication or commitment offered at trial. The reason for this is clear in the record. The appellant had no experts to testify as to his insanity. The state had four witnesses who concluded he was sane and two went further and stated that he was faking mental illness. The reason and logic for not asserting the defense of insanity is clear. We find no merit in appellant's argument.

Appellant's second point alleges that the trial court erroneously denied appellant's motion to exclude the electronic media, appellant's request for an evidentiary hearing, and appellant's request for the appointment of experts on this issue. The trial court held a hearing on the motion during which the appellant, the state, and the media were present. The trial court determined that the facts set forth in the motion, if proven, would not justify the entry of a restrictive order and did not meet the criteria set forth in our decisions in State v. Green, 395 So. 2d 532 (Fla. 1981), and In re Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764 (Fla. 1979). We agree.

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2. This procedure is in accordance with A.B.A. Criminal Justice Mental Health Standard 7-6.5, A.B.A. Standards for Criminal Justice (2d ed. 1984).

See also State v. Palm Beach Newspapers, Inc., 395 So. 2d 544 (Fla. 1981).

The third issue raised by appellant concerns the failure of the trial court to suppress the introduction into evidence of the gun used to kill the police officer which was seized from underneath a heating grate in the appellant's grandmother's house. Appellant contends that the affidavit in support of the search warrant was insufficient to establish probable cause. We disagree. The affidavit was sufficient to establish probable cause and the trial court properly denied the motion to suppress.

Appellant's fourth point concerns rulings involving the exercise of the trial court's discretion. We find that the record does not demonstrate any abuse of discretion. See Dobbert v. Florida, 432 U.S. 282 (1977).

We have previously rejected appellant's fifth claim that alleges error in the denial of an evidentiary hearing on the issue of whether a death-qualified jury is also a guilt-prone jury. Dobbert v. State, 409 So. 2d 1053 (Fla. 1982). We refuse to revisit this issue.

Sentencing Phase

The appellant raises eight issues concerning the sentencing phase of his trial. We address only his contention that it was reversible error for the trial judge to give the jury the "Allen charge"[3] after the jury had announced that it had become deadlocked during deliberations on whether to recommend a death or life sentence. In Rose v. State, 425 So. 2d 521 (Fla.), cert. denied, 461 U.S. 909, (1983), we faced a similar situation. In that case we stated:

> The record indicates that the charge was given after the jury advised the court by a note which read, "We are tied six to six, and no one will change their mind at the moment. Please instruct us." At that point, the trial judge should have advised the jury that it was not necessary to have a majority reach a sentencing

3. Allen v. United States, 164 U.S. 492 (1896).

> recommendation because, if seven jurors do not vote to recommend death, then the recommendation is life imprisonment. There was no reason to give the "Allen charge" during the penalty phase of the trial. We therefore vacate the death sentence and hold that defendant is entitled to a new sentencing proceeding before a jury.

Id. at 525. We find no logical distinction between the instant case and our Rose decision and hold that the case must be remanded for a new sentencing hearing. We do not find it appropriate to treat the jury recommendation as a life recommendation and the trial judge's sentence as a jury override, as urged by the state. There was no life recommendation in this case and the trial court did not, therefore, consider this significant factor in his sentencing decision. To now treat the jury recommendation as a life recommendation and review appellant's sentence without the benefit of the trial judge's consideration and application of the Tedder doctrine[4] would require this Court to make an assumption as to what sentence the trial judge would have imposed if the jury had actually returned a life recommendation. We decline to do so.

Accordingly, we affirm appellant's convictions and sentences with the exception of the death sentence. We vacate the death sentence and remand to the trial court for a new sentencing proceeding before a jury. In view of the evidence that was presented during the sentencing proceeding, we direct the trial court's attention to the United States Supreme Court decision in Eddings v. Oklahoma, 455 U.S. 104 (1982), and its possible application to the facts of this case.

It is so ordered.

BOYD, C.J., ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., Concur
ADKINS, J., Concurs in the conviction, but dissents from the sentence

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

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4. Tedder v. State, 322 So. 2d 908 (Fla. 1975).

An Appeal and Cross-Appeal from the Circuit Court in and for Dade County,

Thomas E. Scott, Jr., Judge - Case No. 81-19702

William L. Richey of Richey and Munroe, Coral Gables; and Peter M. Siegel and Randall C. Berg, Jr., Miami,

for Appellant/Cross-Appellee

Jim Smith, Attorney General and Calianne P. Lantz, Assistant Attorney General, Miami,

for Appellee/Cross-Appellant

EXHIBIT B

Supreme Court of Florida

No. 61,945

ROBERT PATTEN, Appellant/Cross-Appellee,

vs.

STATE OF FLORIDA, Appellee/Cross-Appellant.

[January 10, 1985]

OVERTON, J.

This is a direct appeal from Robert Patten's conviction of first-degree murder and the imposition of the death sentence. Appellant was also convicted of armed robbery and grand theft, and was found to have violated his probation for the offense of auto theft. He was sentenced to 110 years for the robbery conviction, five years for grand theft, and five years for auto theft, all sentences to be served consecutively. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and we affirm all of appellant's convictions and sentences with the exception of the death sentence. We find that we must vacate the death sentence and remand for a new sentencing proceeding before a jury because the trial judge erroneously instructed the jury that it should try to reach a majority verdict after the jury had advised the court it was deadlocked concerning its sentencing recommendation for the first-degree murder conviction.

The facts reflect that on September 2, 1981, the victim, a Miami police officer, attempted to stop appellant for traveling the wrong way on a one-way street. Appellant abandoned his car,

which was later determined to have been stolen, and fled the scene on foot. He ran down an alley with the officer in pursuit. Witnesses heard gunshots and one witness testified that appellant had hidden in the alley and waited for the officer to approach before shooting him. The officer was found dead with two bullet wounds. One bullet had penetrated his heart, killing him instantly, and another had entered the officer's foot in a manner indicating that the officer had been shot after he was dead and lying prostrate.

Immediately after the shooting, appellant stole a car at gunpoint and fled the area. He was arrested later that day and charged with first-degree murder, armed robbery, grand theft, and violation of probation. Two days later, after obtaining a search warrant, the police recovered the murder weapon from beneath a heating grate in appellant's grandmother's home.

Prior to trial, the court and the prosecutor were apprised of the facts that appellant had been adjudicated not guilty of receiving stolen property by reason of insanity in 1978 and had been involuntarily committed to the Department of Health and Rehabilitative Services for treatment under the provisions of section 394.467, Florida Statutes (1977). On September 25, 1981, the trial court, on its own motion prior to appellant's arraignment, ordered an evaluation of the appellant "covering all issues including insanity and competency and incompetency to stand trial." Prior to receiving the reports of the four experts appointed to examine appellant, and prior to the hearing on appellant's competency to stand trial, counsel for the appellant withdrew a pending motion for release on bail and orally advised the trial court that the defense would be filing a notice of intent to rely on the insanity defense and would request a hearing to determine if appellant was mentally competent to stand trial. Counsel for appellant subsequently filed a written motion requesting a competency hearing.

The court-ordered competency hearing was held on October 9, 1981. Three of the appointed doctors testified before the

court and the fourth doctor's written report was submitted to the court by stipulation. During the course of these proceedings, the 1978 trial court order finding appellant not guilty by reason of insanity and the orders conditionally releasing him were admitted into evidence. The trial court found, in accordance with the unanimous opinion of the experts, that the appellant was competent to stand trial pursuant to the criteria set forth in Florida Rule of Criminal Procedure 3.211. The trial court proceeded to arraign the appellant and, when he stood mute, entered a plea of not guilty on his behalf.

In a pre-trial motion, counsel for the appellant moved for a ruling on the insanity test to be applied at trial. Appellant asserted that the trial court should discard the M'Naghten rule and adopt the A.L.I. Model Penal Code test. While acknowledging that the appellant had been examined by a number of psychiatrists, all of whom indicated that the accused was legally sane under the M'Naghten rule, defense counsel argued that the M'Naghten rule constituted both a denial of substantive and procedural due process and cruel and unusual punishment. The trial court denied the motion, finding that it had no authority to change the criteria for the test for insanity that had been specifically adopted by the Supreme Court of Florida. No written notice of intent to rely on the defense of insanity was ever submitted to the court in accordance with Florida Rule of Criminal Procedure 3.216.

Counsel for the appellant also filed a pre-trial motion to have the electronic media excluded from the courtroom during the trial on the ground that their presence would affect the ability of the appellant to consult with his counsel. The trial court denied the motion after conducting a hearing attended by the state, the defense, and the media.

In the trial phase of the proceedings, the defense did not contest that appellant had killed the police officer; the theory of the defense was that appellant, in firing the shots, had acted "in a moment of panic" and that this tragic offense was not

premeditated murder. The jury found the appellant guilty of all offenses charged.

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state presented the testimony of two psychiatrists who had examined appellant for competency to stand trial and insanity at the time of the offense. Both psychiatrists testified that appellant was able to conform his conduct to the requirements of law and both reflected an opinion that he was trying to fake mental illness.

During sentencing deliberations, the jury advised the trial judge that they were deadlocked six-to-six with regard to a recommended sentence. The judge instructed the jury:

> If you can agree on a majority to either life or death, without trying to pressure you, by talking it over one more time and agreeing one way or another, and I'm not suggesting any result, but if after trying one more time you can't agree and it's still six/six, I will instruct you to go ahead and sign that verdict form that includes life imprisonment without parole for 25 years.

The jury, after continued deliberations, returned with a seven-to-five recommendation for death.

The trial judge imposed the death sentence and found that the following statutory aggravating factors applied: (1) appellant had previously been convicted of a felony involving the use or threat of violence; (2) the murder was committed to avoid a lawful arrest; and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. In finding that there were no mitigating circumstances, the trial court expressly rejected the evidence presented by the appellant to prove that he had suffered from an extreme emotional or mental disturbance at the time of the homicide and that appellant's capacity to appreciate the criminality of his conduct was substantially impaired. The trial court recognized that the testimony of the experts for the state and for the defendant was "in direct contradiction" and expressly found that it should accept the testimony of the state's witnesses. The trial judge concluded that there were no statutory or nonstatutory mitigating factors applicable to this case.

Guilt Phase

In his first point, appellant argues that his prior adjudication of not guilty by reason of insanity and his subsequent civil commitment require the state to present evidence to establish his sanity as an element of the offense even though appellant failed to file a written notice of intent to claim insanity as a defense and failed to offer any evidence of that defense at trial. Florida Rule of Criminal Procedure 3.211 requires a defendant to file in writing a notice of intent to rely on the defense of insanity. Counsel for appellant advised the court orally, after the court had appointed doctors to examine appellant but before the examinations were complete, that she planned to file a notice of intent to rely on the defense of insanity. After all four court-appointed experts found appellant competent to stand trial and competent at the time of the offense under the state's modified M'Naghten test, however, counsel did not attempt to assert the defense of insanity under that test. This was not an inadvertent omission by counsel. Facing the obvious improbability of a successful insanity defense under these circumstances, counsel sought to have the trial judge reject the modified M'Naghten test and adopt the broader criteria contained in the American Law Institute's Model Penal Code, including the "irresistible impulse" test. This Court has expressly rejected that portion of the A.L.I. insanity test that the appellant requested the trial court to accept. See Mines v. State, 390 So. 2d 332 (Fla. 1980); In re Standard Jury Instructions in Criminal Cases, 327 So. 2d 6 (Fla. 1976).

The criteria adopted by this Court for insanity at the time of the offense are as follows:

> The law does not hold a person criminally accountable for his conduct while insane, since an insane person is not capable of forming the intent essential to the commission of a crime. A person is sane and responsible for his crime if he has sufficient mental capacity when the crime is committed to understand what he is doing and to understand that his act is wrong. If at the time of an alleged crime a defendant was by reason of mental

> infirmity, disease or defect unable to understand the nature and quality of his act or its consequences or, if he did understand it, was incapable of distinguishing that which is right from that which is wrong, he was legally insane and should be found not guilty by reason of insanity.
>
> Insanity may be permanent, temporary, or may come and go. . . .
>
> . . . .
>
> Unrestrained passion or ungovernable temper is not insanity, even though the normal judgment of the person may be overcome by passion or temper.

Fla. Std. Jury Instr. Crim. Cases, 2.11(b)-1 (S. Ct. Comm. 1976). See also Fla. Std. Jury Instr. Crim. Cases 3.04(b)(S. Ct. Comm. 1982).

We stated in Wheeler v. State, 344 So. 2d 244, 246 (Fla. 1977), that this "jury instruction on insanity correctly states the law of Florida," and we directed that "it shall be utilized in all trials" after the date that opinion became final. In Wheeler, we explained that we had declined "to adopt the so-called 'irresistible impulse' portion of the A.L.I. test which excuses from criminal responsibility the defendant who 'lacks substantial capacity . . . to conform his conduct to the requirement of the law,'" although we did adopt the "'disease or defects element' of the A.L.I. test."[1] Id. The trial court properly denied appellant's motion.

The position of the appellant, that the state in this cause had the initial burden of proving sanity, is neither logical nor reasonable. If we adopted appellant's position, the state would have been obligated to present the four expert witnesses who would have testified that appellant was sane at the time of the offense and, in so doing, they would have necessarily related the history of his prior criminal convictions and his commitment for psychiatric problems. The production of this evidence by the state in its case in chief would be mandated under appellant's argument, even though the appellant had not

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1. The Florida standard for determining a defendant's competency to stand trial is essentially identical to the newly adopted A.B.A. Criminal Justice Mental Health Standard 7-6.1, A.B.A. Standards for Criminal Justice (2d ed. 1984).

placed his sanity in issue at the trial and the state's evidence of sanity would be prejudicial to the appellant. It is important to recognize that insanity is an affirmative defense in this state and a defendant has the burden of coming forward and presenting some evidence of insanity at trial. Under this process, once a defendant presents evidence of insanity, the prosecution has the burden of disproving defendant's claim beyond a reasonable doubt.[2] The argument that the appellant's prior adjudication of not guilty by reason of insanity and his involuntary civil commitment require the state to prove competency is correct only when the defense of insanity is asserted and evidence of the adjudication and commitment is introduced at trial. In this case the defense of insanity was not asserted, nor was the evidence of appellant's prior adjudication or commitment offered at trial. The reason for this is clear in the record. The appellant had no experts to testify as to his insanity. The state had four witnesses who concluded he was sane and two went further and stated that he was faking mental illness. The reason and logic for not asserting the defense of insanity is clear. We find no merit in appellant's argument.

Appellant's second point alleges that the trial court erroneously denied appellant's motion to exclude the electronic media, appellant's request for an evidentiary hearing, and appellant's request for the appointment of experts on this issue. The trial court held a hearing on the motion, during which the appellant, the state, and the media were present. The trial court determined that the facts set forth in the motion, if proven, would not justify the entry of a restrictive order and did not meet the criteria set forth in our decisions in State v. Green, 395 So. 2d 532 (Fla. 1981), and In re Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764 (Fla. 1979). We agree.

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2. This procedure is in accordance with A.B.A. Criminal Justice Mental Health Standard 7-6.9, A.B.A. Standards for Criminal Justice (2d ed. 1984).

See also State v. Palm Beach Newspapers, Inc., 395 So. 2d 544 (Fla. 1981).

The third issue raised by appellant concerns the failure of the trial court to suppress the introduction into evidence of the gun used to kill the police officer which was seized from underneath a heating grate in the appellant's grandmother's house. Appellant contends that the affidavit in support of the search warrant was insufficient to establish probable cause. We disagree. The affidavit was sufficient to establish probable cause and the trial court properly denied the motion to suppress.

Appellant's fourth point concerns rulings involving the exercise of the trial court's discretion. We find that the record does not demonstrate any abuse of discretion. See Dobbert v. Florida, 432 U.S. 282 (1977).

We have previously rejected appellant's fifth claim that alleges error in the denial of an evidentiary hearing on the issue of whether a death-qualified jury is also a guilt-prone jury. Dobbert v. State, 409 So. 2d 1053 (Fla. 1982). We refuse to revisit this issue.

Sentencing Phase

The appellant raises eight issues concerning the sentencing phase of his trial. We address only his contention that it was reversible error for the trial judge to give the jury the "Allen charge"[3] after the jury had announced that it had become deadlocked during deliberations on whether to recommend a death or life sentence. In Rose v. State, 425 So. 2d 521 (Fla.), cert. denied, 461 U.S. 909, (1983), we faced a similar situation. In that case we stated:

> The record indicates that the charge was given after the jury advised the court by a note which read, "We are tied six to six, and no one will change their mind at the moment. Please instruct us." At that point, the trial judge should have advised the jury that it was not necessary to have a majority reach a sentencing

3. Allen v. United States, 164 U.S. 492 (1896).

> recommendation because, if seven jurors do not vote to recommend death, then the recommendation is life imprisonment. There was no reason to give the "Allen charge" during the penalty phase of the trial. We therefore vacate the death sentence and hold that defendant is entitled to a new sentencing proceeding before a jury.

Id. at 525. We find no logical distinction between the instant case and our Rose decision and hold that the case must be remanded for a new sentencing hearing. We do not find it appropriate to treat the jury recommendation as a life recommendation and the trial judge's sentence as a jury override, as urged by the state. There was no life recommendation in this case and the trial court did not, therefore, consider this significant factor in his sentencing decision. To now treat the jury recommendation as a life recommendation and review appellant's sentence without the benefit of the trial judge's consideration and application of the Tedder doctrine[4] would require this Court to make an assumption as to what sentence the trial judge would have imposed if the jury had actually returned a life recommendation. We decline to do so.

Accordingly, we affirm appellant's convictions and sentences with the exception of the death sentence. We vacate the death sentence and remand to the trial court for a new sentencing proceeding before a jury. In view of the evidence that was presented during the sentencing proceeding, we direct the trial court's attention to the United States Supreme Court decision in Eddings v. Oklahoma, 455 U.S. 104 (1982), and its possible application to the facts of this case.

It is so ordered.

BOYD, C.J., ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., Concur
ADKINS, J., Concurs in the conviction, but dissents from the sentence

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

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4. Tedder v. State, 322 So. 2d 908 (Fla. 1975).

An Appeal and Cross-Appeal from the Circuit Court in and for Dade County,

Thomas E. Scott, Jr., Judge - Case No. 91-19702

William L. Richey, of Valdes-Fauli, Richardson, Cobb & Petrey, Miami, Florida; and Peter M. Siegel and Randall C. Berg, Jr., Miami, Florida,

for Appellant/Cross-Appellee

Jim Smith, Attorney General, and Calianne P. Lantz, Assistant Attorney General, Miami, Florida,

for Appellee/Cross-Appellant

EXHIBIT C

FILED
SID J. WHITE
JAN 24 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF THE

STATE OF FLORIDA

ROBERT PATTEN, Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO. 61,945 Appeal from the Eleventh Judicial Circuit Capital Case

MOTION FOR REHEARING

and

MOTION TO SUPPLEMENT THE RECORD

Defendant, through undersigned counsel, moves this Court for a Rehearing, pursuant to Rule 9.330(a), and to Supplement the Record, pursuant to Rule 9.200(f), Florida Rules of Appellate Procedure, and in support thereof states:

I

Motion to Supplement the Record

The Court's opinion attaches great significance to the absence from the Record transmitted to the Court of a written Notice of Intent to Rely on the Defense of Insanity. That importance is contrary to counsels' expectation given this Court's prior case law.

The conclusion that no written Notice of Intent to Rely on an Insanity Defense was filed is erroneous. If, for purposes of the attached Motion for Rehearing, the Court is not satisfied that a written notice was filed, appellant requests that this Court temporarily relinquish jurisdiction to the trial court to permit a hearing and determination of whether, in fact, the written notice was filed, as authorized by Rule 9.200(f), Florida Rules of Appellate Procedure.

Defendant submits that the record currently before the Court amply establishes that a Notice of Intent was filed. Because prior case law placed no importance on the existence of notice, written or otherwise, where a defendant had previously been found insane, counsel did not deem it necessary to formally invoke the

procedures of Rule 9.200(f). Nevertheless, out of an excess of caution, defendant's Reply Brief specifically stated: "If the Court is seriously concerned that defendant did not provide such a notice, even though the state had actual notice, defendant suggests this Court temporarily relinquish jurisdiction to permit the record to be supplemented." Defendant's Reply Brief, page 2, n.1.

It is true that the Record as transmitted to this Court fails to contain the Notice of Intent. Nevertheless, the Record belies the Court's conclusion that no written notice was filed. It shows that the state received a copy of defendant's Notice of Intent to Rely on the Defense of Insanity in open court (Tr. 35-36). In response (certainly for no other reason) the state filed a Motion demanding an Insanity Bill of Particulars, asserting therein that the defendant "has entered a plea of not guilty by reason of insanity . . ." (R. 101). The Motion was denied on the ground that the information had been previously furnished (R. 129).

The Appendix to this Motion to Supplement the Record contains the affidavits of Marsha L Lyons, Esquire, lead defense counsel and G. Bartram Billbrough, assistant defense counsel and currently an Assistant Attorney General. Their affidavits assert that a Notice of Intent to Rely on the Defense of Insanity was filed in open Court, as indicated on pages 35 and 36 of the transcript. Additionally, the Appendix contains the affidavit of Peter M. Siegel, Esquire, one of defendant's appellate counsel, attesting to his locating a copy of the Notice of Intent in the file maintained by the Clerk of the Circuit Court. Said document is not a part of the Record transmitted to this Court. A certified copy of the document is attached to Mr. Siegel's affidavit. The Appendix also contains the affidavit of William L. Richey, Esquire, another of defendant's appellate counsel, attesting to his discussions with the State's Attorney responsible for prosecution of Robert Patten. Finally, the Appendix contains an affidavit by Thomas Scott, the former

Circuit Court Judge who presided over the trial. All the affidavits indicate that the Notice of Intent was filed.

As these affidavits clearly demonstrate, the absence of the actual piece of paper is attributable to an error by the Court Clerk and not defense counsel's failure to prepare and serve the notice. Moreover, there can be no question that both the State and the trial court were fully aware of the existence of the Notice from the earliest stages of the proceedings.

WHEREFORE, appellant again requests, this time by way of Motion, that if the Court doubts that a Notice of Intent was filed, it temporarily relinguish jurisdiction to the trial court to permit an evidentiary hearing on the issue of whether the Notice of Intent was filed.

II

Motion for Rehearing

Defendant moves for a rehearing on the following grounds: (1) a Notice of Intent to Rely on the Defense of Insanity was filed in the trial court, (2) the reversal of existing case law and the retroactive application of the new rule of law to defendant violates the Due Process Clause, and (3) because a trial court has no authority to reject a jury verdict that is permitted by the jury instructions, the defendant is entitled to the benefit of the jury's apparent life recommendation.

1. Notice of Intent.

The defense did file a Notice of Intent to Rely on the Defense of Insanity. The facts and circumstances are detailed above, and need not be repeated. This Court's conclusion that "[n]o written notice of intent to rely on the defense of insanity was ever submitted to the court in accordance with Florida Rule of Criminal Procedure 3.216" (slip opinion, p. 3) is not correct. Although not filed by the Clerk, the transcript reflects delivery in open court (Tr. 36). Thus, to the extent a written notice is required to trigger the state's burden of proof with respect to the mental state of the defendant, that trigger was

given.

2. Retroactive Application of a Change of Law.

Prior to the instant decision, Florida followed the long-established and widespread rule that one who has been adjudged insane is presumed to continue so until the state establishes, at trial, that his sanity has returned. That rule can be found as early as 1892. Armstrong v. State, 30 Fla. 170, 11 So. 618 (1892). It has been consistently followed to date. Corbin v. State, 129 Fla. 421, 176 So. 435 (1937); Acree v. State, 15 So.2d 262 (Fla. 1943); Emerson v. State, 294 So.2d 721 (Fla. 4th DCA 1974); Alexander v. State, 380 So.2d 1188 (Fla. 5th DCA 1980); Livingston v. State, 383 So.2d 947 (Fla. 2d DCA 1980); King v. State, 387 So.2d 403 (Fla. 1st DCA 1980); Eason v. State, 421 So.2d 35 (Fla. 3d DCA 1982). This unbroken line of authority required the state to prove at trial that Robert Patten was competent at the time of the alleged offenses.

Because the presumption was of insanity, and because the state bore the burden of proof, the question of whether the defendant was sane at the time of the offense cannot properly be characterized as an affirmative defense.[1]

For the first time, this Court has now held that insanity is an affirmative defense even where the defendant has previously been found insane and his competency not judicially restored. Undoubtly, the Court has the power to adopt such a rule -- prospectively -- not retroactively. The Court has overlooked the fact that retroactive application of a new rule of procedure, because it disadvantages the defendant, violates the Due Process Clause. A rehearing is requested because of the Court's omission

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1. Although the Evidence Code's presumption rules do not apply to criminal proceedings, the nature of a presumption, set forth in § 90.302, Fla. Stat. (1983), is fully applicable to the operative effect of a legitimate presumption in the criminal law context. All presumptions, whether implicating the burden of producing evidence or the burden of proof, require the party against whom the presumption operates to go forward or suffer the consequences of the presumption. Since the criminal defendant previously adjudged insane is entitled to a presumption of continuing insanity, unless the state does something to overcome the presumption, the state has failed to establish all essential elements of the offense.

to consider this vital doctrine.

The Court's opinion, without citation, reverses at least five prior decisions of this Court. Perkins v. Mayo, 92 So.2d 641 (Fla. 1957); Horace v. Culver, 111 So.2d 670 (Fla. 1959); Dixon v. Cochran, 142 So.2d 5 (Fla. 1962), cert. denied, 371 U.S. 866 (1962); Clark v. Wainwright, 148 So.2d 273 (Fla. 1963); Yates v. Wainwright, 151 So.2d 832 (Fla. 1963). Florida law, for nearly a century, has clearly held that the presumption of sanity does not exist once a person has been found insane. Instead there is a presumption of continuing insanity which can only be removed by proof of sanity. Wells v. State, 98 So.2d 795 (Fla. 1957). See, Bratten, Florida Criminal Procedure §7.4, pp. 89-90 (1983). The consequences are that the state, not the defendant, bears the initial burden of going forward, as well as the ultimate burden of proof.

Moreover, all the Florida cases establishing the state's burden were decided under procedures that required defendants, other than those previously judged insane, to give notice of intent to rely on the defense of insanity. The initial rule, which did not require a separate written notice, was statutory, last found at § 909.17, Fla. Stat. (1969), repealed by Ch. 70-339, §180, Laws of 1970. See, Adkins, Florida Criminal Law and Procedure 384 (1st ed. 1954).

The initial adoption of the Florida Rules of Criminal Procedure made no change in the notice requirement. According to the Rules of Criminal Procedure Committee, the original version of Rule 3.210(b), Florida Rules of Criminal Procedure (1967), was the same as the statute. In re Florida Rules of Criminal Procedure, 196 So.2d 124, 149-50 (Fla. 1967).

The 1972 revision made no change. In re Florida Rules of Criminal Procedure, 272 So.2d 65, 104-05 (Fla. 1972). Indeed, this Court was careful to note that the Rules of Criminal Procedure were just that, procedure, and did not effect substantive rights [272 So.2d at 65-66 (Justice Adkins, concurring)]. The West commentary to the Rules make it clear that there was no

intent to change the rule of the cases relied upon by defendant. The author notes:

> If an accused has been adjudged insane at a prior time, then the burden shifts to the state to establish that said person was sane at the time of the crime in view of the presumption of continuing insanity. Wells v. State, 1957, 98 So.2d 795.

Author's Comments to Rule 3.210, 33 F.S.A. p. 364 (West 1975). Further, the author's note specifically states that: "Paragraph (b) [of Rule 3.210] is the same as the prior paragraph (b) of Rule 3.210 [1967 Rules of Criminal Procedure] and former F.S.A. §909.17."

The 1977 revision of Rule 3.210 for the first time imposed the requirement that a separate written notice of intent to rely upon the defense of insanity be filed. Rule 3.210(e), Florida Rules of Criminal Procedure (1977). There is no indication in the 1977 revision that the authors meant to change the rule of Wells v. State, 98 So.2d 795 (Fla. 1957), Perkins v. Mayo, 92 So.2d 641 (Fla. 1957), or any of the other cases relied upon by defendant. See, In re Rules of Criminal Procedure, 343 So.2d 1247, 1256-1260 (Fla. 1977).

The 1980 revision separated the rules concerning competency to stand trial and competency at the time of offense. It adopted current Rule 3.216(b) which, according to the Committee, was "[e]ssentially the same as in prior rules; provides that written notice must be given in advance by the defendant." In re Rules of Criminal Procedure, 389 So.2d 610, 624-626 (Fla. 1980). Again, there is not the slightest hint that adoption of the rules was meant to reverse the rule of law relied upon by defendant.

Until this Court's decision in the instant matter, the courts of Florida, in an unbroken line of cases dating back to 1892, had uniformly followed the rule that a prior finding of insanity creates a presumption of continuing insanity and shifts the burden to the state to come forth with proof of sanity. Alexander v. State, 380 So.2d 1188 (Fla. 5th DCA 1980). The Court's opinion reverses this long established Florida rule. Only by reversing the applicable rule of law is the Court able to

hold that insanity is an affirmative defense and that the defendant bears the burden of presenting evidence of insanity sufficient to raise a reasonable doubt before the burden shifts to the state to prove sanity beyond a reasonable doubt. Perhaps significantly, the Court does not cite a single Florida case for the proposition of law it applies to defendant.

A new rule of law cannot be applied retroactively if it prejudices the defendant. The Ex Post Facto Clause is a limitation upon the power of the Legislature and does not of its own force apply to the Judicial Branch of government. "But the principle on which the Clause is based -- the notion that persons have a right to fair warning of conduct which will give rise to criminal penalties -- is fundamental to our concept of constitutional liberty. . . As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment." Marks v. United States, 430 U.S. 188, 191-192, 97 S.Ct. 990, 992-993, 51 L.Ed.2d 260 (1977).

"If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." Bouie v. City of Columbia, 378 U.S. 347, 353, 84 S.Ct. 1697, 1702, 12 L.Ed.2d 894 (1964).

A law is ex post facto if it applies to events occurring before its enactment and if it disadvantages the offender affected by it. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). In explaining, the Court noted:

> We have also held that no ex post facto violation occurs if the change effected is merely procedural, and does "not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." Hopt v. Utah, 110 U.S. 574,590, 4 S.Ct. 202, 210, 28 L.Ed. 262 (1884). See Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977). Alteration of a substantial right, however, is not merely procedural, even if the statute takes a seemingly procedural form. Thompson v. Utah, 170 U.S. 343, 354-55, 18 S.Ct. 620, 624, 42 L.Ed. 1061 (1898); Kring v. Missouri, supra, at 232, 2 S.Ct., at 452.

Id., 101 S.Ct. at 964, n.12.

"If a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect." Bouie v. City of Columbia, 378 U.S. 347, 353, 84 S.Ct. 1697, 1702, 12 L.Ed.2d 894 (1964). The Bouie Court concluded:

> When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law "in its primary sense of an opportunity to be heard and to defend [his] substantive right."

378 U.S. at 354, 84 S.Ct. at 1703. State v. Byers, 102 Idaho 159, 627 P.2d 788 (1981), clearly recognizes that a change in the law by judical decision making is ex post facto and, therefore, violative of the Due Process Clause. In Byers, the Idaho Supreme Court abolished the requirement of corroboration for sex offender crimes. However, because no corroborative testimony was offered at Byers' trial, his conviction was reversed. "Obviously," noted the Court, "our holding today alters the legal rules of evidence such that 'less or different testimony than the law required at the time of the commission of the offense (is necessary) in order to convict the offender.'" 627 P.2d at 795.

"Perhaps the easiest case is that in which a judicial decision subsequent to the defendants' conduct operates to his detriment by overruling a prior decision which, if applied to the defendant's case, would result in his acquittal. For example, the later decision may . . . disallow a defense permitted in an earlier case." Lafave & Scott, Handbook on Criminal Law 94-95 (1972).

This Court's opinion, in fact, overrules prior precedent to the detriment of the defendant. Under the prior law, defendant's conviction could not stand. Under the law has set forth in the Court's opinion, Robert Patten's conviction is affirmed.

United States v. Williams, 475 F.2d 355 (D.C. Cir. 1973), is on all fours with the instant case. In Williams the Legislature

changed the rules concerning establishing insanity by shifting both the quantum of proof and the party who bore the burden of proof. In finding that statutory modification to violate the Ex Post Facto Clause if applied to defendants whose crimes were committed prior to the statutory amendment, the court held:

> A long time ago the United States Supreme Court defined ex post facto laws to include "[e]very law which alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." Calder v. Bull, 3 U.S. (3 Dall.) 386, 390. 1 L.Ed. 648 (1798). (Emphasis in original.) That definition represents the law today just as it did in 1798. The retroactive application given Section 207(6) by the trial court "alter[ed] the legal rules of evidence" so that appellant was convicted on "less, or different, testimony, than the law required at the time of the commission of the offence." Certainly the court's charge, "'in its relation to the offence, or its consequences, alter[ed] the situation of the accused to his disadvantage.'" Thompson v. Utah, 170 U.S. 343, 351, 18 S.Ct. 620, 623, 42 L.Ed. 1051 (1898), quoting United States v. Hall, 2 Wash.C.C. 366. Moreover, Congress, in enacting Section 207(6), specifically intended to alter the situation of the accused to his disadvantage. Congress was concerned that existing law "* * * permitt[ed] dangerous criminals, particularly psychopaths, to win acquittals of serious criminal charges on grounds of insanity by raising a mere reasonable doubt as to their sanity* * *." H.R.Rep. No.91-907. 91st Cong., 1st Sess., 74 (1970).
>
> Under the circumstances, appellant's conviction must be reversed on ex post facto grounds.

475 F.2d at 356-57 (Footnotes omitted)(emphasis in original).

This Court's holding that insanity is always an affirmative defense does precisely what was condemned in Williams.

Changes in the rules of evidence that work to the detriment of the defendant are barred by the Ex Post Facto Clause. The Clause extends to any alteration, even one labeled procedural, "which in relation to the offense or its consequences, alters the situation of a party to his disadvantage." Kring v. Missouri, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1882). A typical example is Walker v. State, 433 So.2d 469 (Ala. 1983). In Walker the Alabama Supreme Court held that repeal of the law making inadmissible statements made by a child while in police custody worked such a substantial disadvantage to the juvenile as to

invoke the Ex Post Facto Clause. The Court went on to hold that "[b]ut for the legislature's repeal [of the evidentiary bar], the defendant admittedly would have been acquitted. Certainly such a change deprives the defendant of a right in a most substantial way." 433 So.2d at 473.

Similarly, in State v. R. H., 273 S.E.2d 578 (W.Va. 1980), the prior law provided that no testimony of a juvenile offender given at a transfer hearing could be admitted into evidence at any subsequent criminal trial. The trial judge announced that he would apply the new juvenile code, which did not contain the admissibility bar. As a result, the juvenile chose not to testify in order to protect his Fifth Amendment rights, and the juvenile was transferred for trial as an adult. The conviction was reversed, the court finding that application of the new rule violated the Ex Post Facto Clause. The detriment occurred because the offender, in order to protect his right against self-incrimination, was forced to give up any meaningful chance to prevent the transfer.

So too, with Robert Patten. Under the prior law, his conviction cannot stand. Under the law has set forth in the Court's opinion, the conviction is affirmed. That is precisely what the Ex Post Facto Clause is meant to prevent.

Accord, Goode v. State, 50 Fla. 45, 39 So. 461 (1905); United States v. Goodheim, 651 F.2d 1294 (9th Cir. 1981); Government of Virgin Islands v. Civil, 591 F.2d 255 (3d Cir. 1979); United States v. Henson, 486 F.2d 1292, 1304-1308 (D.C. Cir. 1973); State v. Mauro, 139 Ariz. 422, 678 P.2d 1386 (Ariz. 1984); State v. Mee, 102 Idaho 474, 632 P.2d 663 (1981); People v. Martinez, 82 Misc. 2d 56, 368 N.Y.S.2d 699 (Sup.Ct. 1975).

Appellant's position, contrary to the Court's opinion (slip opinion, p. 7) is both logical and reasonable. In addition, it is in accord with prior case law. First, of course, no matter how obvious the defendant's guilt, no matter how mute defense counsel stands, the state always bears the burden of proving each and every element of the offense. United States v. Goetz, 746

F.2d 705 (11th Cir. 1984). It is true that the state, in order to meet its burden, would have had to produce expert testimony of defendant's competency at the time of the offense. It is also true that the testimony, in all probability, would inform the jury of defendant's prior commitments. It is not necessarily true that the testimony would, of necessity, have had to inform the jury of defendant's prior acquittal of criminal offenses by way of insanity, since it would have been sufficient for the trial court to instruct the jury that because of a prior adjudication of insanity, the defendant is presumed to continue to be insane until proved otherwise. Nor, in light of the nature of the insanity defense, would defendant be prejudiced by a full telling of his mental health history.

Finally, shifting the burden of producing evidence can have a very significant effect on the jury's perception of the mens rea of the defendant. If the state, as part of its case in chief, and not as rebuttal, is forced to attempt to prove defendant's competency, the jury may well conclude that where there is smoke there is fire. And more importantly for Robert Patten's case, even if the jury did not find him incompetent, compelling the state to go forward with testimony concerning competency may well have caused the jury to return a verdict of second degree murder, the only real defense tendered to the jury.

Defendant requests a rehearing because this Court overlooked the rule of law that the adoption of a new rule of law cannot be applied retroactively. "Hard cases, as we all know, make bad law. This is an exceedingly hard case . . . I am sympathetic with the majority's dilemma when asked to free . . . the apparent perpetrator of a gruesome crime in the name of a legal theory. However, the theory that a person accused of a crime is innocent until found guilty beyond a reasonable doubt by a jury of his peers is, I think, at the foundation of the Anglo-American system of criminal law; it responds to the fundamental demands of justice; and it must be closely guarded against erosion even in

as difficult a situation as this one."[2]

3. The Jury's Apparent Life Recommendation Cannot Be Rejected By the Trial Court.

The Court apparently overlooked the basic relief requested by appellant as a result of the Rose[3] violation, which was a remand for a new sentencing premised on the fact that the jury obviously intended to return a life recommendation. (Appellant's Initial Brief, p. 47). Appellant believes he is entitled to this relief for the following reasons.

The jury was not deadlocked (slip opinion, p. 9). Ther be no deadlock, as a matter of definition, at a penalty phase proceeding. As Rose made clear, six to six is a life recommendation, not deadlock.

Unlike Rose, sub judice, counsel for the defendant made it absolutely clear to the trial judge that six to six was a life recommendation, that the trial court had no alternative but to accept it and that counsel objected to any further deliberation by the jury. Both prosecution and defense agreed that six to six should be deemed a life recommendation. The so-called Allen charge was given over objection (Tr. pp. 1773-1778).

The error in refusing to accept the recommendation of the jury is solely the error of the trial judge. It is not unlike the situation in Central Taxi Service, Inc. v. Greenberg, 418 So.2d 333 (Fla. 3d DCA 1982) where the jury initially answered only three of four special verdict questions. The court sent the jury back with all four questions and the jury returned with a different answer to one of the three previosly answered questions, now finding the defendant not negligent. In approving the trial court's subsequent setting aside of the second verdict and adoption of the first answer, the court noted:

> Because the first verdict was not in fact published and, since it was incomplete, could

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2. United States ex rel. Ross v. Franzen, 688 F.2d 1181, 1187 (7th Cir. 1982)(Judge Cuadahy, dissenting).

3. Rose v. State, 425 So.2d 521 (Fla.), cert. denied, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983).

> not in any event have been deemed final or beyond its control, see Glecer v. Fletcher, 299 So.2d 134 (Fla. 3d DCA 1974), we recognize that the jury would have retained the theoretical authority to alter even its answers to questions 1-3, although it had been asked only to fill in the damages blank. . . . There is, however, utterly no basis for believing that it would have done so in fact under those circumstances. It is for this reason that we do not disapprove the discretionary conclusion that the new trial should concern only damages, rather than including the liability issue as well.

418 So.2d at 335, n.5 (citations omitted, emphasis in original).[4]

This Court failed to address the defendant's constitutional right to have the action of the jury accepted by the trial court. When the trial judge exceeds his authority and improperly cuts off the jury's decision making process, the defendant is entitled to the benefit of the jury's apparent verdict.

Defendant's entitlement flows from the fact that a trial judge has no authority to reject a jury's favorable treatment of the defendant. That has been true since at least 1670. Bushell's Case (1670) Vaughan's Rep. 135. It represents one of the great triumphs of the common law, the victory of the jury over the king. As a result, the judge is not authorized to prevent the return of a verdict in a criminal case. See, I Holdsworth, A History of English Law 337-347 (7th ed, reprinted 1971); Thayer, The Jury and its Development, Part III, 5 Harv. L. Rev. 357, 382-385 (1892).

It is difficult to find cases of recent origin on point. That is undoubtly because it is accepted as basic constitutional and common law that the court must accept the decision of the jury. One of the early case is State v. Arrington, 7 N.C. 355, 3 Mur. 571 (1819). A similar result was reached in the later case of State v. Ostrander, 30 Mo. 13 (1860). These early decisions established that the trial court must record the verdict first brought in so long as it is not an informal or insensible verdict, or one that is not responsive to the issues submitted.

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4. This is not a case in which the jury erred, like Grant v. State, 33 Fla. 291, 14 So. 757 (Fla. 1894).

Robert Patten's jury was ready to return a responsive verdict. The Court prevented it. Robert Patten is entitled to the benefit of that apparent verdict.

There is no authority that permits a "court to refuse to accept a verdict complete in substance and responsive to the issues." State v. Chambliss, 142 Miss. 256, ___, 107 So. 200, 202 (1926). The State may argue that there was no verdict. That is true in the sense that none of the formalities attendant to the return and entry of a verdict took place. But the fault lies with the trial judge, not the jury, and certainly not the defendant. In none of the cases which stand for the hornbook proposition that a court cannot reject a verdict were the formalities complied with. They couldn't be because the trial court refused to accept the verdict. That type of error cannot be permitted. The defendant is entitled to the jury's obvious recommendation of life.

A typical example of refusal to permit the trial judge to reject the jury's decision is State v. Craig, 176 N.C. 740, 97 S.E. 400 (1918). There the jury returned with a verdict of "not guilty". The judge sent the jury back to consider whether the verdict was "not guilty because of mental incapacity." The court held the trial court has no authority to send the jury back and that the first verdict was binding.

A case much closer to Robert Patten's situation is Darsey v. State, 138 Ga. 501, 71 S.E. 661 (1911), app. dis'd, 231 U.S. 741, 34 S.Ct. 318, 58 L.Ed. 462 (1913) where the jury returned with a guilty verdict for a non-charged lesser offense. The judge refused to accept the verdict and sent the jury back. The jury deadlocked and the judge declared a mistrial. The court held that double jeopardy prevented a retrial because the original verdict constituted an acquittal of the greater offenses and the trial court lacked the authority to refuse to accept it. See also, State ex rel. Earsom v. Fisher, 103 W.Va. 658, 138 S.E. 316 (1927). Indeed, the defendant is entitled to the benefit of the jury's decision even if the jury returns a verdict that is

contrary to the Court's charge. Register v. State, 10 Ga.App. 802, 74 S.E. 428 (1912).

That action of Robert Patten's trial judge is no different, for analytical purposes, from the action of a trial judge who grants a mistrial in the absence of manifest necessity. In both situations, the formalities attendant to the return of a verdict are cut off by the trial judge's error. In the mistrial situation, the judge's error results in barring a second trial because of the bar of double jeopardy. Thus, the defendant benefits from a totally unknown jury verdict. In Robert Patten's situation, the intent of the jury was obvious. The trial judge's error should not serve to deprive defendant of the benefit of the jury's recommendation for life.

In that respect, the case is like Grandberry v. Bonner, 653 F.2d 1010 (5th Cir. 1981) where the trial court abused its discretion by declaring a mistrial. Because there was no manifest necessity, the trial court erred. Retrial of the defendant was, therefore, barred by the Double Jeopardy Clause. Florida decisions are similar. State ex. rel. Williams v. Grayson, 90 So.2d 710 (Fla. 1956); State ex rel. Alcala v. Grayson, 23 So.2d 484 (1945); State ex rel. Wilson v. Lewis, 55 So.2d 118 (Fla. 1951). See also, U.S. v. Spinella, 506 F.2d 426 (5th Cir.), cert. denied, 423 U.S. 917 (1975).

Here the judge did not declare a mistrial. The defendant will not go free because the trial court erred. The defendant will, however, receive the benefit of the jury's untainted deliberations. There is no sound reason to deprive a capital defendant of the benefit of the jury's favorable recommendation. That does not seem unfair in light of the nature of the case and the nature of the error.

WHEREFORE, appellant respectfully requests that this Court grant the Motion for Rehearing and (1) recede from its determination that insanity is an affirmative defense or apply its decision that insanity is always an affirmative defense only prospectively and in either case reverse all convictions on the

ground that the state failed to prove an essential element of the offense, and (2) if the guilty finding is upheld, remand the matter for a new sentencing proceeding premised on the existence on a jury recommendation for life.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was delivered by U.S. Mail this 23 day of January, 1985, to Assistant State Attorney Arthur Berger, State Attorney's Office, 1351 N.W. 12th Avenue, Miami, Florida 33125, and Assistant Attorney General Calianne Lantz, Attorney General's Office, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128.

_____
Peter M. Siegel, Esq.

EXHIBIT D

Supreme Court of Florida

THURSDAY, APRIL 18, 1985

ROBERT PATTEN, Appellant/Cross-Appellee,

vs.

STATE OF FLORIDA, Appellee/Cross-Appellant.

Case No. 61,945

Circuit Court Case No. 81-19702 (Dade County)

Appellant's motion to supplement the record in this cause is granted. We have considered appellant's motion for rehearing in light of our revised opinion in this cause and we deny the motion.

A True Copy

TEST:

SUPREME COURT OF THE STATE OF FLORIDA

Clerk, Supreme Court

JB

cc: Hon. Richard P. Brinker, Clerk
Hon. Gerald T. Wetherington, Chief Judge

Peter M. Siegel, Esquire
Randall C. Berg, Jr., Esquire
William L. Richey, Esquire
Arthur Berger, Esquire
Calianne P. Lantz, Esquire

EXHIBIT E

Everybody has one vote and everybody has the same say so and nobody with the biggest mouth controls.

Now, if the majority of the jury determine that Robert Patton should be sentenced to death, you should recommend an adversary sentence as follows: A majority of the jury advise and recommend to the Court that it impose the death penalty upon Robert Patton.

On the other hand, if by six or more votes the jury determines that Robert Patton should not be sentenced to death, your adversary sentence would be: The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Robert Patton without the possibility of parole for 25 years, and likewise, on that ballot, there is a spot for the vote.

Now, let me show that to everybody so you understand. There are two ballot forms with the style of the case.

The jury advises and recommends to the Court that it impose the death sentence upon Robert Patton. So say

we all, the majority and the foreperson again signing it.

There is a spot for and against for the number of votes. How many are voting for or against.

If the decision is to impose a life imprisonment sentence, there is a verdict that says: We, the jury, recommend to the Court that it impose a life of imprisonment upon Robert Patton without the possibility of parole for 25 years. So say the majority, foreperson, again, and a place for the vote.

Does everybody understand?

Now, you will retire to consider your recommendation.

When seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreperson and returned to the Courtroom.

I will likewise, as in the other phase, give you paper and pencil for any communication.

I will give you the jury charges to consider and to read them if you want to and the form of the verdict.

At this time, you may now retire to consider your verdict.

(Whereupon, the jury exited the Courtroom at 3:55 p.m., after which the following proceedings were had:)

THE COURT: Other than the objections previously stated, are there any additional ones?

EXHIBIT P

Resuming State of Florida versus Robert Patton. Defendant present.

The Court has received the following note. It's quite interesting.

We have reached a six/six vote. On our instruction sheet it says, "On the other hand, if by six or more votes the jury determines that Robert Patton should not be sentenced to death, your adversary sentence will be: The jury advises and recommends that the Court impose the sentence of life imprisonment upon Robert Patton without the possibility of parole for 25 years.

On the other hand, in the next paragraph, it says: When seven or more are in agreement: What now?

That's exactly what the charges say. I noticed it. I've given it several times and I often wondered what would happen.

MS. LYONS: It's my understanding that if there's a six/six--

THE COURT: Here's a copy of the jury charge. They sent me the copy. It's very polite of them.

MS. LYONS: It's my understanding that if the vote is six/six, that's a life recommendation and that's the way--

THE COURT: What is the law on that?

MR. WAKSMAN: I noticed that when I was reading the charge this week.

THE COURT: I noticed it and I've been through this 13 times and I've never felt it would come up because it was an unusual thing.

On a majority vote, why would they go six/six? I could give them an Allen charge.

MS. LYONS: Your Honor, we would respectfully object to such a charge. If the Court needs some law concerning the fact of what a six/six recommendation means, I would like to ask the Court for a brief recess so we can provide that for the Court.

THE COURT: Granted. Take a few minutes. You take a look at it too.

Get me Florida Statute 921.141. Berger, go with him.

MR. BERGER: I read that through and I didn't see

anything covering that point.

THE COURT: Mr. Syden, bring them back in and let's do something. Get in Mr. Patton.

All right, Ms. Lyons, let's do something.

Resuming State of Florida versus Robert Patton.

Okay, Ms. Lyons, what is your position?

MS. LYONS: My position is that a six/six split is a recommendation for life.

THE COURT: Would the State stipulate to that or does the State disagree?

MR. WAKSMAN: Without any law--there doesn't appear to be a case on point that we could find, but a simple reading of the instruction--it says when six or more determine that death should not be imposed, the jury then recommends life. That's what it says.

THE COURT: Let me tell you what bothers me about that. I have gotten the Florida Standard Jury Charge in front of me, page 81 and 82, and I would like to make some comment about that, but then I would like to compare it to Florida Statutue 921.141 because I think the statute is controlling. The statute is what's concerning me here.

The Florida Standard Jury Charge says that your decision may be made by a majority of the jury. Then it goes on to talk in the next paragraph about whether

you recommend a sentence of life or a sentence of death.

Then it goes on to say: If the majority determine the sentence should be death, and then it goes on to say, which is the contradictory part: On the other hand, if by six or more votes, the jury determines that the Defendant should not be sentenced to death, your adversary sentence will be: "Life."

Then it goes on to say: When seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to the Court, so there are five places where they say a majority and only one place where it says six or more which is contrary by its nature.

In order to try and understand, I went back to the authorizing document which is Florida Statute 921.141 to determine whether or not there was anything like that in similar language in the authorizing statute and there isn't.

The statute says, and I quote: "Notwithstanding--" This is the only reference in the statute.

"Notwithstanding the recommendation of a majority of the jury, the Court after weighing the aggravating and mitigating circumstances shall enter a sentence of life or death," but the only reference in this statute

is to a majority. It doesn't say anything in that statute about six or more being a life imprisonment and it seems to me, since the statute is the authorizing document, what it basically is saying is that the authors of the standard charges have drafted an interpretation of the statute which may not be founded.

MS. LYONS: Your Honor, I would respectfully request at the very least some brief opportunity to do some research on this matter.

My reading of the statute, and I went back to the statute immediately too, is that the statute--it only speaks to a recommendation of life or a recommendation of death and then goes on to say what the Court may do; that the Court may impose life or death regardless of the recommendation by the jury which is why I would argue that based on the poor language of the statute--

THE COURT: This is what I will do. I will bring the jury in and I will say it is my understanding that after deliberating, you have a six/six deadlock, and Dennis will probably say yes, that's our position.

Okay, at that point, you can come side bar and say to me, "Based upon that, we think that there's a finding of life," and that will preserve your record.

I'll overrule your objection and I'll give the deadlock charge, and if they come back with the six/six

after the deadlock charge, then it's over. You take your position up and you can get it ruled on.

If they come back one way or another--it maybe in favor of you, seven/five. Then you're in good standing.

You can still take the position that six/six means life and I was wrong in what I did, but that way both sides are protected and we get a breaking of the deadlock because I don't know what the legal effects are of it and these people are sitting back there.

Any objection by that procedure?

MR. WAKSMAN: No, Your Honor.

THE COURT: You're objecting to it. Your position is; I should write them a note saying six/six is life imprisonment.

MS. LYONS: Yes, Your Honor.

THE COURT: Objection overruled.

Bring the jury in.

(Whereupon, the jury entered the Courtroom at 6:45 p.m.,after which the following proceedings were had:)

THE COURT: Everybody have a seat and relax for a minute. I know you have been working hard.

We are missing one person; right?

Mr. Levy?

JUROR NUMBER THREE: He will be just a moment.

THE COURT: Okay, all the jurors being in the

Courtroom, Mr. Dennis, I would like to ask you a question.

From your note, after almost three hours of deliberations, it is my understanding that it is as follows: That basically it's a six/six vote. Six jurors for life and six for death; is that correct?

MR. DENNIS: Yes, sir.

THE COURT: Here's what I would like to have you do: Now, I know all of you have worked very hard to find a-- to make a majority rec ndation in this case; okay?

A majority meaning seven, and apparently it has been impossible for you so far.

Sometimes an early vote before discussion can make it hard to reach a majority about the case.

The vote, not the discussion, might make it hard to see all sides of this issue.

Now, we are aware that it is legally permissible for a jury to disagree. There are two things the jury can lawfully do.

Agree on a verdict or disagree on what the facts of the case may truly be.

There is nothing to disagree about on the law. The law is as I told you. If you have any disagreements about the law, I should clear them for you now. That should be my problem, not yours.

If you disagree over what you believe the evidence

showed, then only you can resolve that conflict if it is to be resolved.

I have one request of you: By law, I cannot demand this of you, but I want each of you to go back into the jury room and then taking turns tell each of the other jurors about any weakness of your own position.

You should not interrupt each other or comment on each other's views until each of you have had a chance to talk.

After you have done that, if you simply cannot agree on a majority vote; okay? If you cannot agree on a majority vote, let me know and I will give you a further instruction; okay?

Mr. Dennis?

MR. DENNIS: The main question was some of the members of the jury felt there was a conflict, that they only--that a deadlock meant that--we were vague about whether we needed a majority vote for a life sentence.

THE COURT: Let me see the attorneys at side bar.

(Whereupon, the following side bar conference was held outside the presence of the jury:)

THE COURT: Rather then giving them an answer to that question, I would like to tell them this: I would like to say, "I'm not sure what the law is either on that issue. That's why I would like to have you agree to a

majority, but if you can't, and you still have six/six, then I want you to enter a vote for life.

That's exactly what I want to tell them. Any problem with that?

MR. WAKSMAN: No.

THE COURT: I'm not sure what the law is. If they can't come to an agreement or a majority, then let them sign the verdict for life as six/six.

That will be my instruction without you waiving any previous objections.

MS. LYONS: Without waiving any previous objection, we would accept that procedure.

(Whereupon, the side bar conference was concluded, after which the following proceedings were had:)

THE COURT: Mr. Dennis, I have been through this many, many times, and the answer to your question is: I don't know what the law is, quite frankly.

As you pointed out, there is a contradiction in the jury charge and because of that, I would like to see if you can agree on one or the other on a majority based on what I just suggested.

After trying it one more time, if you cannot resolve the six/six vote, then I want you to sign a recommendation for life imprisonment because I think that's what the jury charge says.

If you can agree on a majority to either life or death, without trying to pressure you, by talking it over one more time and agreeing one way or another, and I'm not suggesting any result, but if after trying one more time you can't agree and it's still six/six, I will instruct you to go ahead and sign that verdict form that includes life imprisonment without parole for 25 years.

Is that understood?

Do the very best you can. God love you.

Thank you.

(Whereupon, the jury exited the Courtroom at 6:50 p.m.,after which the following proceedings were had:)

THE COURT: Okay, everyone be seated for a minute.

I understand both sides position, but for the Appellate Court, whether it be the Third District or Supreme Court, I want them to understand my feelings which is basically that in the moments that are before the Court, I have to make fast decisions. I don't have the ability like an Appellate Court does of taking six months to decide what should be done, you know, embanked with a lot of briefs. I got five minutes or ten minutes to try to decide what is right.

I don't know what the law is. It appears from the statute it should be a majority, but the charge says six or more is life, so what I have tried to do, basically,

so the Appellate Court understands my position, is that I felt by giving the deadlock charge, it would not force anything on anybody and I tried to modify it based on a jury recommendation as opposed to a verdict.

I'm going to follow what the jury standard charges say.

I think in this way I protected your record completely. You know, if they got a six/six deadlock, if I'm wrong, you got the appellate record. You know, they can come back and say it was six/six and I shouldn't have done another thing and they've got to come back with life.

If that ain't the law, what is in the Florida Standard Charges, then--and the State maybe right or I maybe right and then I would protect the State's interest but by not knowing what the law is, I have tried to provide for both sides in my actions.

That is all I can say. Thank you.

EXHIBIT G

ARGUMENT

I

THE STATE (APPELLEE) DID NOT HAVE TO INTRODUCE EVIDENCE TO ESTABLISH THAT APPELLANT WAS SANE AT THE TIME OF THE OFFENSE, WHERE NO EVIDENCE WAS INTRODUCED AT THE TIME OF TRIAL, SO AS TO RAISE THE AFFIRMATIVE OF NOT GUILTY BY REASON OF INSANITY. (Restated).

Appellant contends that his prior adjudication of insanity required Appellee (the State) to establish his sanity as an essential element of its case. Appellee submits that Appellant's contention is legally erroneous. The State does not have to introduce evidence to establish that a defendant was sane at the time of the offense where no evidence was introduced at the time of trial so as to raise the affirmative defense of not guilty by reason of insanity.

It is important to remember that there is a clear legal distinction between the issue of insanity at the time of the offense and the competency of a defendant to stand trial. This Court has recently reiterated the criteria which are used in Florida for ascertaining whether a defendant is competent to stand trial. In Scott v. State, 420 So.2d 595, 597 (Fla. 1982), the court stated the following:

> The competency criteria for Florida are the same as those for federal cases: "whether [the defendant] has sufficient present ability to consult with his lawyer with a

> reasonable degree of rational under standing--and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960); Lane v. State, 388 So.2d 1022 (Fla. 1980). In order to determine this, it is the responsibility of the trial court to conduct a hearing for competency to stand trial whenever it reasonably appears necessary to ensure that a defendant meets the standard of competency. §918.15, Fla.Stat. (1979); Fla.R.Crim.P. 3.210 (1979).

In compliance with the above-enumerated criteria, the trial court conducted a full hearing prior to the trial as to the issue of whether or not Appellant was competent to stand trial (See R. Exh. 51-102). The record demonstrates that substantial, competent evidence was adduced at said hearing to support the trial court's ultimate finding. The trial court considered the eleven criteria enumerated in Rule 3.211, Fla.R.Crim.P. and found Appellant competent to stand trial. (R. Exh. 99). Thus, Appellant was judicially declared competent prior to the actual commencement of his trial.

The issue which is actually presented is whether the affirmative defense of insanity at the time of the offense (as opposed to competency to stand trial) was ever raised by Appellant and if so, whether the burden was ever shifted to the State requiring proof of sanity at the time of the offense.

In Patterson v. New York, 432 U.S. 197, 97 S.Ct. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), the United States Supreme Court declined to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Patterson, supra, makes it clear that so long as a jury is instructed that the State has the burden of proving every element of the crime beyond a reasonable doubt, there is no due process violation. Krzeminski v. Perini, 614 F.2d 121, 123 (6th Cir. 1980). The State may properly place the burden of proving affirmative defenses such as self-defense, extreme emotional disturbance or insanity upon the defendant. Krzeminski, supra at 123; Patterson, supra; Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977); Rivera v. Delaware, 429 U.S. 877, 97 S.Ct. 226, 50 L.Ed.2d 160 (1976), dismissing for want of a substantial federal question, 351 A.2d 561 (Del. 1976); Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 130 (1952).

The Constitution does not compel a State to adopt a burden shifting principle on the issue of criminal capacity. The burden of proving insanity could constitutionally remain at all times on the defendant. Stacy v. Love, 679 F.2d 1209 (6th Cir. 1982); Leland v. Oregon, supra.

In United States v. Collins, 690 F.2d 431, 434 (5th Cir. 1982), the Court stated that it had never defined the quantum of evidence necessary to constitute sufficiency for submitting the issue of sanity to a jury; instead, each case must be decided on its own facts, with careful attention to the weight of the evidence presented on both sides.

Patterson, supra, makes it clear that such a case by case analysis should be made based upon the State's own substantive law as to the burden of proving affirmative defenses. The United States Court of Appeals for the Fifth Circuit has held that when raised as a defense in a criminal case the issue of a defendant's sanity is for the jury, to be determined from all the evidence. United States v. Davis, 513 F.2d 320 (5th Cir. 1975). This language makes it clear that an affirmative defense is a defense which must be raised. Thus, any presumptions which attach as to the issue will not be invoked until such an issue is actually raised.

Florida law has always required some quantum of evidence prior to shifting the burden of proof as to sanity at the time of the offense to the State. The Florida standard for sanity at the time of the offense is the ability to distinguish right and wrong, the M'Naghten test. Ferguson v. State, 367 So.2d 631 (Fla. 1982); Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978). A defendant's sanity at the time of

the offense is a factual question for the jury. Ferguson, supra at 435. See also Eason v. State, 421 So.2d 35, 37 (Fla. 3d DCA 1982). Thus, the issue becomes a fact question as to a defendant's affirmative defense.

The burden of proving insanity is on the defendant because he is presumed sane under the law. When he rebuts the presumption of sanity by presenting evidence of insanity sufficient to raise a reasonable doubt, the burden then shifts to the State to prove sanity beyond the reasonable doubt. Johnson v. State, 408 So.2d 813, 815 n. 2 (Fla. 3d DCA 1982); see also, Brock v. State, 69 So.2d 344 (Fla. 1954). Once there is testimony sufficient to present a reasonable doubt as to sanity at the time of the offense, the presumption vanishes and the burden is shifted. See, Blatch v. State, 216 So.2d 261 (Fla. 3d DCA 1968). Where defense evidence is insufficient to create a reasonable doubt as to sanity at the time of the offense, the presumption of sanity will not be overcome. Trotter v. State, 377 So.2d 34 (Fla. 1st DCA 1979).

The federal courts have held that at least "some evidence" must be introduced to weaken a defendant's presumption of sanity. See, e.g. United States v. Marable, 657 F.2d 75 (4th Cir. 1981); United States v. Henderson, 680 F.2d 659 (9th Cir. 1982); United States v. Coffman, 567 F.2d 960 (10th Cir. 1977).

Regardless of the amount of evidence which is needed to shift the burden of proof, an affirmative defense is clearly involved. The issue will not be presented where there is absolutely no evidence is raised before the jury. A defendant is not entitled to a court ruling on the minimal sufficiency of the prosecution's evidence as to a defense that the accused has not placed in issue. United States v. Myers, 692 F.2d 823 (2d Cir. 1982). This is especially true in light of the fact that the defense of insanity can be waived. See Scarborough v. United States, 683 F.2d 1323 (11th Cir. 1982).

It is true that a prior adjudication of insanity can be evidence of insanity. See e.g. Boone v. State, 183 So.2d 869, 871 (Fla. 1st DCA 1966); Hixon v. State, 165 So.2d 436, 439 (Fla. 2d DCA 1964). Yet the jury must be presented with some evidence to this effect. In fact, the jury instruction as to insanity clearly notes that if the evidence establishes that the defendant had been adjudged insane by a court, and restoration of legal sanity has not occurred, the jury should assume that the defendant was legally insane at the time of the commission of the alleged crime, unless the evidence convinces the jury otherwise. See, 3.04(b), Florida Standard Jury Instructions.

The issue of the general validity of the common evidentiary device of the presumption has been discussed by the United States Supreme Court in County Court of Ulster County, New York v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979). In that case, the court noted that in criminal cases, the ultimate test of any device's constitutional validity is that the device must not undermine the fact finder's responsibility at trial.

Although the ultimate burden of proof in a criminal prosecution always remains with the prosecution, United States v. Manetta, 551 F.2d 1352 (5th Cir. 1977); Davis v. United States, 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499 (1895), the defendant must make the question of sanity an issue before the burden shifts to the state. The question must be in issue before the evidentiary device of a presumption comes into play.

In the cause sub judice, it was irrelevant whether or not there was in fact a prior adjudication of insanity. The appellant introduced no evidence of any kind to place sanity at time of the offense in issue. In fact no formal notice of intent to rely on an insanity defense was filed. Thus, regardless of whether the presumption was applicable in light of the trial court's finding that Appellant was "competent" to stand trial, Appellant did nothing to raise the

ultimate issue so as to shift the burden of proof to the State.

Moreover, the evidence adduced pursuant to the competency hearing (R. Ex. 50-100) as well as the psychological reports of the appointed doctors (See R. 553; 557) clearly demonstrate that had Appellant raised the issue of insanity, the State could have easily rebutted any presumption which may have followed. Even the defendant's girlfriend testified that Appellant felt he would be able to basically fool examining physicians. (See R. Exh. 90). The record does not demonstrate that had defense counsel sought to actually raise an insanity defense, there would have been affirmative evidence to support said theory of defense. Based upon this factor, it is unlikely that failure to raise insanity as a defense could be asserted as grounds for a ineffective assistance of counsel claim, see Holmes v. State, __So.2d___ (Fla. 1983)(Case No. 61,672; Opinion filed February 3, 1983) [8 F.L.W. 56].

The decisions which Appellant has relied upon are not controlling, as they are by the most part based upon the burden which the State bears as to competency to stand trial, not as to the burden of proof as to sanity at the time of the offense. It is apparent, that older decisions of Florida courts used the terms "incompetency" and

"insanity" interchangeably. Appellant had failed to demonstrate that the State failed to meet its burden of proof as to the elements of the charged offense. Prior to trial, Appellant was judically declared competent to stand trial. No evidence of insanity was presented to the jury, nor did Appellant seek to rely on insanity as a defense. Affirmance of Appellant's conviction is therefore mandated.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court and that I served the annexed Apperdix to the Petition for Certiorari on respondent by placing a copy in the United States mail, first class mail, postage prepaid, addressed as follows:

Calianne Lantz, Esquire
Assistant Attorney General
Office of the Attorney General
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128.

All parties required to be served have been served. Done this 6th day of June, 1985.

Peter M. Siegel, Esq.

CASE NO. 84-6873

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

* *

ROBERT PATTEN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

* *

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QUESTIONS PRESENTED

I

WHETHER A DEFENDANT WHO INTRODUCES NO EVIDENCE BY ANY MEANS (AFFIRMATIVELY OR BY CROSS-EXAMINATION) THAT RAISES THE AFFIRMATIVE DEFENSE OF INSANITY AT THE TIME OF THE OFFENSE IS DENIED DUE PROCESS WHERE THE STATE DID NOT "REBUT" THE AFFIRMATIVE DEFENSE AND WHETHER THE SUPREME COURT OF FLORIDA'S DECISION TO THE CONTRARY CONSTITUTES JUDICIAL EX POST FACTO APPLICATION OF THE LAW?

II

WHETHER THE SUPREME COURT OF FLORIDA'S DECISION REMANDING THE CASE TO THE TRIAL COURT FOR RESENTENCING, WHERE THE ERROR RESULTING IN REVERSAL OF THE INITIAL SENTENCE WAS THE GIVING OF AN IMPROPER INSTRUCTION ON SENTENCING TO THE ADVISORY JURY, VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

I
OPINIONS BELOW

The opinion of the Supreme Court of Florida affirming, on direct appeal, Petitioner's convictions for first-degree murder, armed robbery and grand theft, vacating Petitioner's death sentence and remanding the case for a new sentencing proceeding is currently reported in Patten v. State, 467 So.2d 975 (Fla. 1985).

II
JURISDICTION

Petitioner is seeking to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1287(3), based upon his contentions that the State of Florida has deprived him of rights secured by the Constitution of the United States. Respondent submits that this Court may review these claims pursuant to 28 U.S.C.§1256(3), but is urged to decline to do so, as the opinion of the Supreme Court of Florida does not deprive Petitioner of any rights set forth in the United States Constitution.

III
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner has contended that this case involves the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States. The pertinent portions of the Fifth Amendment read as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

IV

STATEMENT OF THE CASE

The petitioner, Robert Patten, was convicted of first-degree murder, and robbery and grand theft, and was found to have violated his probation for the offense of auto theft.

He was sentenced to death for the murder conviction and to 110 years' imprisonment for the robbery conviction, five years for grand theft, and five years for auto theft, all sentences to be served consecutively. On direct appeal, the Supreme Court of Florida affirmed the convictions. Pursuant to Petitioner's claims, the Court vacated the death sentence and remanded the case to the trial court for a new sentencing proceeding before a jury and directed the trial court's attention to this Court's decision in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and its possible application to the facts of this case. Patten v. State, 467 So.2d 975, 980. (See Petitioner's Appendix to Petition for Writ of Certiorari to the Supreme Court of Florida, Exhibit A).

The facts of the offenses in question were that on September, 1981, the victim, a Miami police officer, attempted to stop Petitioner for travelling the wrong way on a one-way street. Petitioner abandoned his car, which was later determined to have been stolen and fled the scene on foot. He ran down an alley with the officer (Nathaniel Broom) in pursuit. Witnesses heard gunshots and one witness testified that Petitioner had hidden in the alley and waited for the officer to approach before shooting him. The officer was found dead with two bullet wounds. One bullet had penetrated his heart, killing him instantly, and another had entered the officer's foot in a manner indicating that the officer had been shot after he was dead and lying prostrate. Patten v. State, supra at 467 So.2d 976.

Immediately after the shooting, stole a care at gun-point and fled the area. He was arrested later that day and charged with first-degree murder, armed robbery, grand theft and violation of probation. Two days later, after obtaining a search warrant, the police recovered the murder weapon from beneath a heating grate in Petitioner's grandmother's home.

Prior to trial, the court and the prosecutor were apprised of the facts that Petitioner had been adjudicated not quilty of receiving stolen property by reason of insanity in 1978 and had been involuntarily committed to the Department of Health and Rehabilitative Services for treatment under the provisions of Section 394.467, Florida Statutes (1977). On September 25, 1981, the trial court, on its own motion prior to Petitioner's arraignment, ordered an evaluation of the Petitioner "covering all issues including insanity and competency and incompetency to stand trial." Prior to receiving the reports of the fourth experts appointed to examine petitioner, and prior to the hearing on Petitioner's competency to stand trial, counsel for the petitioner withdrew a pending motion for release on bail and orally advised the trial court that the defense would be filing a notice of intent to rely on the insanity defense and would request a hearing to determine if Petitioner was mentally competent to stand trial. Counsel for petitioner subsequently filed a notice of intent to rely on the insanity defense and a motion requesting a competency hearing, Id.

The court-ordered competency hearing was held on October 9, 1981. Three of the appointed doctors testified before the court and the fourth doctor's written report was submitted to the court by stipulation. During the course of these proceedings, the 1978 trial court order finding Petitioner not guilty by reason of insanity and the others conditionally relasing him were admitted into evidence. The trial court found, in accordance with the unanimous opinion of the experts, that Petitioner was competent to stand trial pursuant to the criteria set forth in Florida Rule of Criminal Procedure 3.211. The trial court proceeded to arraign the Petitioner and, when he stood mute, entered a plea of not guilty on his behalf.

In a pre-trial motion, counsel for the Petitioner moved for a ruling on the insanity test to be applied at trial. Petitioner asserted that the trial court should discard the M'Naghten rule and adopt the A.L.I. Model Penal Code test. While acknowledging that the Petitioner had been examined by a number of psychiatrists, all of whom indicated that the accused was legally sane under the M'Naghten rule, defense counsel argued that the M'Naghten rule constituted both a denial of substantive and procedural due process and cruel and unusal punishment. The trial court denied the motion, finding that it had no authority to change the criteria for the test for insanity that had been specifically adopted by the Supreme Court of Florida.

In the trial phase of the proceedings, the defense did not contest that Petitioner had killed the police officer; the theory of the defense was that petitioner, in firing the shots, had acted "in a moment of panic" and that this tragic offense was not premeditated murder. Further, no evidence was submitted regarding Petitioner's prior adjudication of not guilty by reason of insanity.

During sentencing deliberations, the jury advised the trial judge that they were deadlocked six-to-six with regard to a recommended sentence. The judge instructed the jury:

> If you can agree on a majority to either life or death, without trying to pressure you, by talking it over one more time and agreeing one way or another, and I'm not suggesting any result, but if after trying one more time you can't agree and it's still six/six, I will instruct you to go ahead and sign that verdict form that includes life imprisonment without parole for 25 years.

The jury, after continued deliberations, returned with a seven-to-five recommendation for death. The trial judge subsequently imposed that death sentence as to the murder conviction.

Following the filing of the revised opinion in the instant case in Patten v. State, supra, on April 18, 1985, Petitioner filed a Petition for Writ of Certiorari to the Supreme Court of Florida. This brief is filed in opposition to the granting of the writ.

V

REASONS IN OPPOSITION TO GRANTING CERTIORARI

PROPOSITION I

A DEFENDANT WHO INTROCUCES NO EVIDENCE BY ANY MEANS (AFFIRMATIVELY OR BY CROSS-EXAMINATION) THAT RAISES THE AFFIRMATIVE DEFENSE OF INSANITY AT THE TIME OF THE OFFENSE IS NOT DENIED DUE PROCESS WHERE THE STATE DID NOT "REBUT" THE AFFIRMATIVE DEFENSE OF INSANITY AT THE TIME OF THE OFFENSE AND THE FLORIDA SUPREME COURT'S DECISION TO THIS EFFECT DID NOT CONSTITUTE JUDICIAL EX POST FACTO APPLICATION OF THE LAW.

Petitioner contends that the decision of the Supreme Court of Florida in the instant case constitutes ex post facto application of Florida law and that as such, it violates Constitutional due process protections. It is Respondent's position that there is no violation of due process where a defendant, such as was the case herein, introduces no evidence by any means, either affirmatively or by cross-examination, that raises the affirmative defense of insanity at the time of the offense, thus not shifting the burden to the State to "rebut" the affirmative defense, where the State introduces no evidence to that effect. Moreover, the decision of the Florida Supreme Court is consistent with its prior opinions and at minimum, only clarifies existing case law that has confused "terms of art" as to the complex field of litigation concerning competency and insanity clains. Thus, there will be no judicially imposed ex post facto application of the law in question in the instant case, pursuant to the Florida Supreme Court's opinion in this case.

Contrary to Petitioner's implications, Florida has never held that insanity is not an affirmative defense nor that it is raised without the defendant bearing the burden of production (contrary to the burden of persuasion) to raise the affirmative defense of insanity. In this case, as noted above, no evidence whatsoever of insanity was presented to the trier of fact to actually raise the defense of insanity. Florida courts have long held that the burden of proving insanity is on the defendant because he is presumed sane under the law, and that once a defendant rebuts the presumption of sanity by presenting evidence of insanity sufficient to raise a reasonable doubt, the burden shifts to the State to prove sanity beyond a reasonable doubt. Johnson v. State, 408 So.2d 813, 815 n.2 (Fla. 3d DCA 1982); Holmes v. State, 374 So.2d 944 (Fla. 1979), cert. denied, 446 U.S. 913, 100 S.Ct. 1845, 64 L.Ed.2d 267 (1980). See also; Brock v. State, 69 So.2d 344 (Fla. 1954). In fact, the jury instruction as to insanity, as approved by the Supreme Court of Florida, clearly specifies that if the evidence establishes that the defendant has been adjudged insane by a Court, and restoration of legal sanity has not occurred, the jury should assume that the defendant was legally insane at the time of the commission of the alleged crime, unless the evidence convinces the jury otherwise. 3.04(b), Florida Standard Jury Instructions in Criminal Cases.

Petitioner has paraphrased language from decisions that constitute old caselaw where the conceptual difference between a defendant's competency to stand trial and the

elements of and procedure for raising an insanity defense. For example, it is a due process right for one not to be tried when incompetent. This right exists regardless of the elements necessary to prove the changed offense. Florida has never changed the elements necessary for an insanity defense. Florida had never retracted or altered the test followed, a modified M'Naghten test. See, e.g., Ferguson v. State, 367 So.2d 631 (Fla. 1982); Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978). Moreover, Florida courts have consistently held that a defendant's sanity at the time of the offense, is a factual question for the jury. Ferguson, supra at 435. See also; Eason v. State, 421 So.2d 35, 37 (Fla. 3d DCA 1982). Florida law has therefore held that the issue of sanity is a fact question as to a defendant's affirmative defense. It therefore follows that Petitioner was on notice by virtue of Florida law that to go forward with an affirmative defense, evidence had to be presented to trier of fact, notwithstanding the fact that he could easily raise the presumption provided for by his prior status, as a prior adjudication of insanity is considered evidence of insanity. See, e.g., Boone v. State, 183 So.2d 869, 871 (Fla. 1st DCA 1966); Hixon v. State, 165 So.2d 436, 439 (Fla. 2d DCA 1964).

Furthermore, the instant case does not involve a situation where the State has changed the elements of a crime or a defense. This situation merely involves a matter of procedure. No case cited by Petitioner demonstrates that the test for sanity, a modified M'Naghten rule test, was altered between the time prior to the commission of the crime in question and the time of the Florida Supreme Court's ruling as to Petitioner's appeal.

The Florida Supreme Court's decision in this case has merely clarified the difference between the burden of persuasion and the burden of production. The burden of production is not a substantive element of a charged offense. Moreover, procedural questions are not presented until the affirmative defense is raised. It is clear that the true defense in this case was not insanity, but, rather that in firing the shots at the victim, the petitioner had acted "in a moment of panic" and not by premeditation. Patten v. State, supra at 467 So.2d 976. The instant decision simply makes existing law clear, namely that once evidence of insanity is introduced, including by evidence of a prior finding of insanity, the burden is shifted on the State to go forward and prove sanity beyond a reasonable doubt. Since Petitioner neither actually relied on an insanity defense, nor presented any evidence at all in order to invoke an evidentiary presumption, he should not be heard to complain of alleged due process right violations by the State of Florida.

Contrary to Petitioner's assertions, the Florida Supreme Court's opinion is clearly not an ex post facto application of a "change in the law", but rather a modern clarification consistent with this Court's prior opinions. The State court has appropriately pointed out insanity is an affirmative defense. See, Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed.130 (1952). Patterson v. New York, 432 U.S. 197, 97 S.Ct.2319, 53 L.Ed.2d 281 (1977), makes it clear that so long as a jury is instructed that the State has the burden of proving every element of the crime beyond

a reasonable doubt, there is no due process violation. Krzeminski v. Perini, 614 F.2d 121, 123 (6th Cir. 1980). The presumption in question is clearly an evidentiary device and the law provides for the trier of fact to be presented with evidence. The Court's opinion is not a departure from the above-noted principle and is not a "change in the law", as it is consistent with its prior pronouncements and those of this Court. Petitioner's Petition for Writ of Certiorari should therefore be denied.

PROPOSITION II

THE SUPREME COURT OF FLORIDA'S DECISION REMANDING THE CASE TO THE TRIAL COURT FOR RESENTENCING, WHERE THE ERROR RESULTING IN REVERSAL OF THE INITIAL SENTENCE WAS THE GIVING OF AN IMPROPER INSTRUCTION ON SENTENCING TO THE ADVISORY JURY, DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The decision of the Supreme Court of Florida remanding the instant case to the trial court for resentencing following a new recommendation by an advisory jury does not violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. In the instant case, the advisory sentencing jury sent a note to the trial court requesting guidance because they were deadlocked 6 to 6 as to whether the recommended sentence should be life imprisonment with a minumum mandatory term of twenty-five (25) years' imprisonment or death. The jury's request prior to the court's subsequent instruction to reconsider the sentence did not rise to the level of a final advisory recommendation of the sentence to be imposed. See, Rose v. State, 461 So.2d 84, 86 (Fla. 1984); See also: Rose v. State, 425 So.2d 521 (Fla. 1982), cert denied, 461 U.S. 909 (1983). Thus, there was no "acquittal" as to the death sentence by the original advisory jury.

Furthermore, as this Court has noted in Spaziano v. Florida, ___U.S.___, 104 S.Ct. 3154, 3165, __L.Ed.2d___(1984), that if a judge may be vested with the sole responsibility with imposing the penalty, then there is nothing constitutionally wrong with the judge's exercising that responsibility

after receiving the advice of the jury. The advice does not become a judgment simply because it comes from the jury, Id. See also: Baldwin v. Alabama, ___U.S.___(1985) (Case No. 84-5743; Opinion filed June 17, 1985)[53 USLW 4759].

The original sentence imposed in this case was set aside as a result of Petitioner's challenge to the instructions given to the advisory sentencing jury. The petitioner chose to appeal the initial sentence and the Double Jeopardy Clause does not relieve a defendant from the consequences of his voluntary choice. United States v. Scott, 437 U.S. 82, 98, 98 S.Ct. 2187, 2198, 57 L.Ed.2d 65 (1978). In addition, the double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence (and resentencing). See, United States v. Di Francesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980).

Moreover, this Court has constantly adhered to the rule that a retrial following a "hung jury" does not violate the Double Jeopardy Clause. Richardson v. United States ___U.S.___, 104 S.Ct. 3081, 3085,___L.Ed.2d____(1984), citing to Logan v. United States, 144 U.S. 263, 297-298, 12 S.Ct. 617, 627-628, 36 L.Ed. 429 (1892). Thus, it follows that it does no harm to the Double Jeopardy Clause to allow for the impaneling of a new advisory sentencing jury were the jury was initially "hung" or "deadlocked." The situation presented herein is analogous to the situation where a defendant is retried in a jury trial following a reversal on appeal resulting from erroneous jury instructions. In those cases, there is no double jeopardy violation. See,

Forman v. United States, 361 U.S. 416, 80 S.Ct. 481, 4 L.Ed.2d 412 (1960). If there is no double jeopardy violation upon the granting of an entirely new trial when the challenge is as to a conviction, it certainly does no harm to grant an entirely new procedure as to sentencing. See, e.g., North Carolina v. Pearce, 395 U.S. 711, 720, 89 S.Ct. 2072, 2078, 231 L.Ed.2d 656 (1960); United States v. Tateo, 377 U.S. 463, 465, 84 S.Ct. 1587, 1589, 12 L.Ed.2d 448 (1964).

Since the decision of the Supreme Court of Florida, in the instant case clearly does not call for a result violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution there is no reason for granting a writ of ceriorari. Petitioner's petition for a writ of certiorari should therefore be denied.

CONCLUSION

Based upon the foregoing reasons and authorities, Respondent respectfully submits that Petitioner's Petition for Writ of Certiorari to the Supreme Court of Florida should clearly be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CALIANNE P. LANTZ, counsel and a member of the Bar of the United States, hereby certify that on the 9th day of July, 1985, I served a single copy of the Brief in Opposition to Petition for Writ of Certiorari filed pursuant to Supreme Court Rules 22.2 and 28 on PETER M. SIEGEL, Esq., and RANDALL C. BERG, Jr., Esq., Florida Justice Institute, Inc., 1400 Ameri First Building, 1 S.E. Third Avenue, Miami, Florida 33131 on this 9th day of July 1985.

CALIANNE P. LANTZ
Assistant Attorney General

dm

SUPREME COURT OF THE UNITED STATES

ROBERT PATTEN *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 84-6873. Decided October 7, 1985

The petition for writ of certiorari is denied.

JUSTICE BRENNAN dissenting:

Adhering to my views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the judgment below so that the court below can determine the sentence—other than death—that may be appropriate.

JUSTICE MARSHALL, dissenting from denial of certiorari.

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). I also continue to believe that the death penalty's cruel and unusual nature is made all the more arbitrary when it is imposed by a judge in the face of a jury determination that death is an inappropriate punishment. See *Jones* v. *Alabama*, —— U. S. ——, —— (1985) (MARSHALL, J., dissenting from denial of certiorari); *Spaziano* v. *Florida*, 468 U. S. ——, —— (1984) (STEVENS, J., dissenting). However, even were I to believe that the death penalty could constitutionally be imposed under certain circumstances and that a jury decision for life could be accorded mere advisory status, I would grant certiorari in this case to decide whether the Double Jeopardy Clause bars the state from forcing a defendant to face a second sentencing jury even though the presumptive validity of his first jury's life recommendation has never been overcome.

I

Petitioner Robert Patten was convicted of first degree murder, and the state sought the death penalty. During subsequent sentencing deliberations, the jury advised the trial judge that they were deadlocked, six to six; the note concluded: "What now?" Over petitioner's objections, the judge responded by giving an *Allen* charge encouraging further deliberations.[1] After continued deliberations, the jury returned with a seven-to-five recommendation for death. The court imposed the death sentence. On appeal, the Florida Supreme Court affirmed petitioner's conviction. It emphasized, however, that under Florida law, "if seven jurors do not vote to recommend death, then the recommendation is life imprisonment." *Rose* v. *State*, 425 So. 2d 521, 525 (Fla. 1982), *cert. denied*, 461 U. S. 909 (1983). The court consequently found the giving of the *Allen* charge improper and vacated the death sentence. At this point, though, rather than instructing the trial judge to determine whether it would be appropriate to enter a death sentence regardless of the jury's action, the court chose to remand the case to the trial court for a new sentencing proceeding before a jury. In his motion for rehearing, petitioner urged that the Double Jeopardy Clause barred a second sentencing proceeding. That motion was denied.

II

In *Bullington* v. *Missouri*, 451 U. S. 430 (1981), this Court held that because Missouri's capital sentencing proceeding was comparable to a trial, in which a life sentence constituted a determination that the prosecution had failed to prove its case, the Double Jeopardy Clause barred the state from subjecting a defendant who had received a life sentence in his first trial to the ordeal of a second sentencing proceeding after his conviction had been reversed. In *Arizona* v. *Rumsey*, 468 U. S. —— (1984), where a life sentence had been im-

[1] *Allen* v. *United States*, 164 U. S. 492, 501–502 (1896).

posed by a judge rather than a jury, the Court found that the Double Jeopardy Clause barred resentencing even though the judge's decision to grant life had been based upon what was later held to be a misinterpretation of state law. "[A]n acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge." *Id.*, at ——.

In Florida, the jury is not the sole decisionmaker in the sentencing proceedings; the trial judge has the power to override a jury's recommendation for life. See *Spaziano* v. *Florida*, *supra*. Yet the defendant who has persuaded a jury to reject the state's claim that he deserves to die has nonetheless won a significant victory, for Florida has severely limited the trial judge's power to override a life recommendation. In *Tedder* v. *State*, 322 So. 2d 908 (Fla. 1975), the Florida Supreme Court held an override to be appropriate only where the "facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Id.*, at 910; accord *Odom* v. *State*, 403 So. 2d 936, 942 (Fla. 1981), cert. denied, 456 U. S. 925 (1982). Thus, while the life recommendation of a Florida jury does not have the conclusive effect of the Missouri jury's decision for life that was considered in *Bullington*, the recommendation is presumed final, subject to reversal only where "virtually no reasonable person could differ."

Because a Florida jury's life recommendation is not completely final, this Court has held that the Double Jeopardy Clause does not bar the judge's override of a jury's life recommendation. *Spaziano* v. *Florida*, *supra*. However, where a defendant is deprived of the benefits of a jury's life recommendation without any subsequent finding by the trial judge that that recommendation was "clear[ly] and convincing[ly]" unreasonable, I believe there to be a double jeopardy bar to the state's demand that the defendant convince yet another jury that he does not deserve to die. If not held unreasonable, a jury's life recommendation should end a Flor-

ida defendant's jeopardy as surely as a life verdict ended that of the Missouri defendant in *Bullington*.

Petitioner was deprived of a jury's life recommendation without any court having found that advisory verdict unreasonable. Under Florida law, a six-to-six vote is a life recommendation. See *Rose* v. *State*, *supra*, at 525. When the trial judge received the jury's note indicating that it was deadlocked six to six, there was therefore nothing left for him to do but recall the jury and apply the *Tedder* standard to its life recommendation. I can scarcely believe that the trial judge would have overriden such a recommendation in this case; had he done so, he doubtless would have been reversed on appeal.[2] But instead, the trial judge altered the verdict by giving an *Allen* charge. Then, even while holding the judge to have erred in giving the charge, the Florida Supreme Court proceeded to disregard the fact that the jury's deadlock was a finding for defendant on the issue of death. The supreme court's decision to remand was not based upon any finding that a life sentence was unreasonable. The supreme court remanded only because the jury's report of a six-to-six deadlock had not been contained in a formal recommendation. Since I do not believe that this adherence to formalism is consistent with the double jeopardy concerns implicated by the supreme court's demand that petitioner convince yet another jury that he does not deserve to die, I must dissent from this Court's refusal to hear this case.

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[2] Indeed, by "direct[ing] the trial court's attention" to *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), "and its possible application to the facts of this case," the Florida Supreme Court suggested its concern that the trial judge had failed to consider evidence militating in favor of a life sentence.